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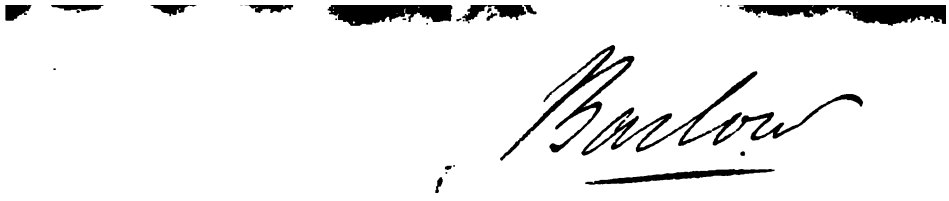

Barlow

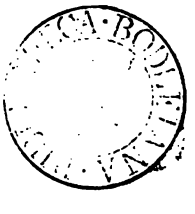
CASES

IN

BANKRUPTCY;

BY GEORGE ROSE, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.



VOL. I.

CONTAINING

Reports of Cases

DECIDED BY

LORD CHANCELLOR ELDON,

FROM EASTER TERM, 1810,

TO

THE SITTINGS AFTER TRINITY TERM, 1813, INCLUSIVE,

AND

CONTEMPORANEOUS CASES

IN OTHER COURTS.

SECOND EDITION.

LONDON:

PRINTED FOR CHARLES HUNTER, LAW BOOKSELLER,

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1821.

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THE Intention of the Author in giving these Cases to the Public, is to present, under one Head, the recent Decisions in Matters of Bankruptcy, and to preserve various little Points of Practice, which, not falling within the Scope of Mr. VESEY's Observations, would otherwise pass unrecorded.

In the Progress of the Work, it was suggested to the Author, that he would greatly contribute to the Utility of it, by selecting from the contemporaneous Reports, the Decisions which fall within this peculiar Branch of Law. That Suggestion has been adopted; and the Volume, in its Completion, presents a Digest, and, as it were, a current Treatise of the Law of Bankruptcy, and, it is hoped, an useful Reference for those, who may have Occasion to consult the recent Decisions on this Subject.

In the Cases adopted, the Author has stated, as concisely as the Nature of it admitted, the Point for the Opinion of the Court; he has compressed the Arguments of Counsel, giving merely the Grounds and the Cases on which they

they relied, or, where the Judgment of the Court has rendered that unnecessary, omitting them altogether; and he has thought it sufficient, except where a Difference of Opinion has occurred on the Bench, or any Position has met with a more or less qualified Reception, simply to express the Concurrence of the Court.

LINCOLN'S INN,
Michaelmas Term, 1813.

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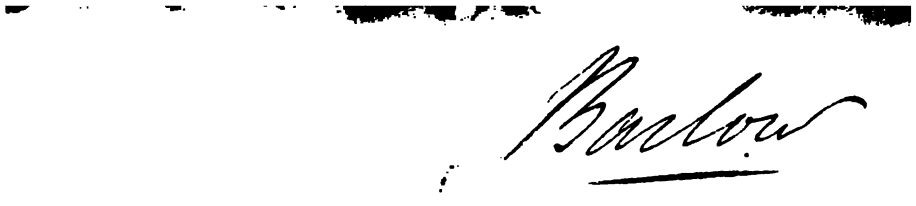
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CASES

IN

BANKRUPTCY, &c.

Ex parte PAGE.—In the Matter of DYSON.

1810, *30th May.*

Obstructing a Messenger in the Execution of his Warrant, is a Contempt of the Great Seal.

THIS was a Petition for an Attachment against a Person of the Name of *Craggs (a)*, for having obstructed a Messenger in taking possession of the Bankrupt's Property.

The Facts appeared to be, that the Messenger came into the House, and shewing his Warrant, took possession: *Dyson*, the Bankrupt, left the House, saying, he would fetch his Attorney; *Craggs* then came forward, declared himself the Owner of the House and Property, and the Messenger departed; he shortly after returned, demanded Possession, and was prevented from obtaining it.

The Lord CHANCELLOR,

If this were *Res integra*, I should be inclined to hold that before I could proceed as for a Contempt, there must have been an Order of this Court; the Warrant under the Statute is the Act of the Commissioners, and not of the

(a) See Page 25, *post*.

1810.

Ex parte PAGE.—In the Matter of DYSON.

Court. But Lord *Hardwick* has held *(a)*, and his Judgment has been confirmed by subsequent Cases *(b)*, that an Obstruction to a Messenger in the Execution of his Warrant is a Contempt of the Great Seal, and by these Decisions I hold myself bound. But the Warrant in this Case was to take possession of the House, Goods, and Property of the *Bankrupt (c)*; and if it had been an Order of this Court, the Person acting under it would only have been authorized to take possession of the House, Goods, and Property of the Bankrupt. Lord *Hardwick* has held, that if the Messenger enter a House, *not* the House of the Bankrupt, yet that an Obstruction to him is a Contempt of the Great Seal; but I think the Question is, whether the Party has acted fairly in the Protection of his Property, or wantonly and contumaciously; and for this Purpose, an Issue should be directed, or *Craggs* should bring Trespass; it should be remembered, that the Petition states merely that the Messenger was unable to obtain Possession, and it may be a Question whether the Messenger having been in Possession under the Warrant, and abandoned it, the Warrant was not spent. This Petition must be dismissed without Costs.

Whether a Messenger, having been in Possession under a Warrant, and abandoned it, the Warrant is not spent.

(a) Ex parte Titner, 1 *Atkins*, 136.

(b) Ex parte Dixon, 8 *Ves.* 104.

(c) For the Form of the Warrant, *vide* 2 *Cooke's* B. L. 19.

30th *May*.

Ex parte HALL.

One Partner can, though the Partnership be dissolved, sign the Bankrupt's Certificate for a joint Debt proved under the Commission by himself and his Co-partner.

THE Object of this Petition was to stay the Allowance of the Bankrupt's Certificate, on the following Grounds.

Hall

1810.

Ex parte HALL.

Hall and *Laxton* had, as Partners, proved a Debt under the Bankrupt's Commission; their Partnership was afterwards dissolved, and *Laxton* alone, without the Consent of, or any Communication with, *Hall*, signed the Certificate.—It was further stated that the Solicitor to the Commission had arrested *Laxton* for a Debt due to him; that he had discharged him without receiving a Shilling of his Debt; and *Laxton*, on his Discharge, signed the Certificate.

Mr. *Roupell*, in support of the Petition, contended, that the Debt being proved under the Commission as a Debt due to the Partnership, *Laxton* alone, after the Dissolution of the Partnership, was not competent to discharge it. He also argued that the Certificate ought to be stayed on the Suspicion of Fraud, arising from the Circumstance of the Solicitor to the Commission having let *Laxton* out of Execution without receiving his Debt.

The Lord CHANCELLOR.

The Act of one Partner binds another *(a)*; and although here the Dissolution of the Partnership intervened, yet the Debt still subsisted as a Debt to the Partnership. If a third Person, without the Knowledge of the Bankrupt, gives Money to obtain his Certificate, it is void. All that is stated in this Petition is Suspicion of Fraud. The Great Seal ought not to send out a fraudulent Certificate to the World; yet it should not withhold it on Suspicion,

(a) That the Act of one Partner will bind another as Partner of a distinct Firm. *Vide Jacaud* v. *French* and others, 12 *East*. 317.

1810. *Ex parte* HALL.

because by so doing it would prevent its being put in a Course of Trial *(a)*.

Petition dismissed.

(a) That a Commission of Bankrupt cannot be supported on the Petition of one of two Partners to whom a joint Debt is due. *Vide* 1 *Taunt.* R. 477.

15th *August*.

Ex parte LLOYD.—In the Matter of LLOYD.

A. in 1808, accepts Bills for *B*'s Accommodation; *B.* becomes Bankrupt, having paid away the Bills, and *A.* takes them up, without having received Value. *A.* (the Debt not being provable under the Commission) brings an Action against *B*, and recovers his Principal, Interest, and Costs. He then sells his Debt, and assigns the Judgment. The Assignee of this Judgment is, under Stat. 49 *Geo.* 3. c. 121. sect. 8, entitled to prove the original Debt under Bankrupt's Commission, and to receive a proportionate Dividend; and the Judgment Debt, though greater than the original, will be barred by the Certificate.

THE Petition in this Case stated, that *Lloyd* and *Wydown*, carrying on Business in Co-partnership together, did, on the 22d *February*, 1806, draw a Bill of Exchange on *Conway, Phelps*, and Co. for £874: 19*s*., and on the 17th *March*, 1806, another Bill for £497: 13*s*: 10*d*; both which Bills were accepted by *Conway, Phelps*, and Co. without their having received any Value for them, and merely for the Accommodation of the Drawers. *Lloyd* and *Wydown* discounted the Bills at the *Bank of England*; but having become Bankrupts before they fell due, *Conway, Phelps*, and Co. were obliged to take them up, without having been provided with Funds by the Drawers for that Purpose. *Conway, Phelps*, and Co. attempted to prove the Debt under *Lloyd* and *Wydown's* Commission, and not being admitted, they, in *Trinity Term*, 1808, brought an Action against them, and got a Judgment for £1530: 6*s*.: 10*d*. being the Amount of the two Bills, with

Interest

1810.

Ex parte, LLOYD.—In the Matter of LLOYD.

Interest and Costs. The Petitioner, on the 21st *December*, 1808, paid Messrs. *Conway, Phelps*, and Co. the Amount recovered by them, and took an Assignment of their Judgment; he now applied under the Statute 49 *Geo.* 3. *c.* 121. *sect.* 8, that he, or *Conway, Phelps*, and Co. for him, might be at liberty to prove £1372: 12*s*: 10*d*. the Amount of the Bills, as a Debt under the Commission against *Lloyd* and *Wydown*, stating that there was a sufficient Fund to pay him a rateable Dividend, without disturbing the Dividends already made.

Sir *Samuel Romilly* and Mr. *Cooke*, in support of the Petition.

The Petitioner having bought this Debt, stands in the Situation of the Creditor from whom he made the Purchase; it is clearly a Debt owing by the Bankrupt: and as the Act of Parliament *(a)*, has taken away the Right of suing at Law, and the Certificate will operate as a Discharge, he ought to be let in to prove; in point of Justice he ought. The only Objection is technical, and applies to all Cases of Assignment after the Commission has issued, and before Proof. It was, upon mature Consideration that the Act of Parliament had a retrospective Operation; it places the Petitioner in the same Situation as if he had paid the Debt before the Commission, instead of after, and was meant to relieve, not only the Creditors, but the Bankrupt himself. The Debt still subsists, the Judgment is no Satisfaction of it. If he had sued out Execution, or had taken a Release from *Conway, Phelps*, and Co. to the Bankrupts, it would have been different; but as the Debt never has been satisfied, he ought to be admitted to prove.

(a) 49 *Geo.* 3. c. 121.

1810.

Ex parte LLOYD.—In the Matter of LLOYD.

Sir *Arthur Pigott* and Mr. *Wetherell* on the other Side.

The Judgment has completely extinguished the original debt, and any further Proceedings must be by *sci. fa.* or by Action of Debt; the Bills of Exchange are totally gone, *Lloyd* having paid the Debt, and taken an Assignment of the Judgment, is neither Surety nor liable, within the Meaning of the Act—how can he make Oath as to his Debt?

[*The Lord* CHANCELLOR.

The Objection as to the Form of the Oath applies to so many Cases, that it contains a great deal too much in it.]

Suppose the Judgment had not been assigned, could *Phelps, Cowsey*, and Co. have proved? But even if they could, the present Petitioner is a stranger, has no Privity with them, and is not entitled to their Equities.

The Lord CHANCELLOR.

There are certain Points in this Case at which we soon arrive. The Acceptors having paid these Bills after the Bankruptcy of the Drawers, could not, as the Law then stood, have proved them under the Commission. The Demand which the Acceptors had after Payment of the Bills, was a Simple-Contract-Debt, for which, before the late Act of Parliament, they might have brought an Action of Assumpsit, and since that Act might have gone in and proved it under the Commission. The Question is, whether, having altered the Situation in which they stood, by becoming Judgment-Creditors, they could have proved; and whether, if they could have proved, their Assignee is entitled to the same Advantage. The Words of the Act are very comprehensive.

(His

1810.

Ex parte, LLOYD.—In the Matter of LLOYD.

(His Lordship here stated the Substance of the Section *(a)*.)

Conway

(*a*) The 8th Section enacts, that in all Cases of Commissions of Bankrupt already issued, under which no Dividend has yet been made, or under which the Creditors, who have not proved, can receive a Dividend equally in proportion to their respective Debts without disturbing any Dividend already made; and, in all Cases of Commissions of Bankrupts hereafter to be issued, where at the Time of issuing the Commission any Person shall be Surety for or be liable for any Debt of the Bankrupt, it shall be lawful for such Surety or Person liable, if he shall have paid the Debt, or any Part thereof in discharge of the whole Debt, although he may have paid the same after the Commission shall have issued, and the Creditor shall have proved his Debt under the Commission, to stand in the place of the Creditor as to the Dividends upon such Proof, and when the Creditor shall not have proved under the Commission, it shall be lawful for such Surety, or Person liable to prove his Demand, in respect to such Payment as a Debt under the Commission, not disturbing the former Dividends, and to receive a Dividend, or Dividends, proportionably with the other Creditors, taking the Benefit of such Commission, notwithstanding such Person may have become Surety or liable for the Debt of the Bankrupt, after an Act of Bankruptcy had been committed by such Bankrupt, provided that such Person had not at the Time when he became such Surety, or when he so became liable for the Debt of such Bankrupt, Notice of any Act of Bankruptcy by such Bankrupt committed, or that he was insolvent, or had stopped Payment: provided always, that the issuing a Commission of Bankrupt, although such Commission shall afterwards be superseded, shall be deemed such Notice; and every Person against whom any such Commission of Bankrupt

1810.

Ex parte, LLOYD.—In the Matter of LLOYD.

Conway and *Phelps* were not Sureties,—but liable. The whole of Sir *Samuel Romilly's* principle stands on this: The Petitioner has purchased the Rights of an Individual, who was entitled to prove, and is, as such Purchaser, entitled to all his Advantages and Equities. Supposing the Judgment would not have prevented *Phelps* and *Conway* from proving under this Act of Parliament, is there any thing that precludes a Person from saying, "If you will exert all your Rights for me, I will pay you your Debts." I have no Doubt of the Justice of this Case, but I have a Doubt upon this. The Operation of the Certificate is, to bar the whole of the Debt; but the Judgment-Debt is greater than the original Debt, which might have been proved under the Commission; and therefore, the Bankrupt will not have the Advantage of being discharged from the Surplus.

Mr. *Cooke* mentioned the Case of *Willet* and *Pringle (a)*, in which it was held, that subsequent Costs were barred by the Certificate.

Aug. 16. *The Lord* CHANCELLOR.

On looking into the Act *(b)*, I think the Prayer of this Petition

Bankrupt has been or shall be awarded, and who has obtained or shall obtain, his Certificate, shall be discharged of all Demands at the suit of every such Person having so paid, or being hereby enabled to prove as aforesaid, or to stand in the place of such Creditor as aforesaid, with regard to his Debt in respect of such Suretyship or Liability, in like manner to all intents and purposes as if such Person had been a Creditor, before the Bankruptcy of the Bankrupt for the whole of the Debt in respect of which he was Surety or was so liable as aforesaid.

(a) 2 New Reports, 190. And *ex parte Hill*, in Notes, *ibid.* 11 *Ves.* 649.

(b) 49 *Geo.* 3. c. 121. Sect. 8.

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tition ought to be granted; at the Time the Acceptors paid the Bills for the Accommodation of the Drawers, they were not Sureties, but liable; and standing in the Situation of Persons liable, having paid the Acceptances, they were clearly within the Act. The Acceptances having been paid, the Bills, as Bills, were gone, but the Acceptors became Simple-Contract Creditors for the Amount, as having paid it for the use of the Drawers: the first Question is, whether *Conway, Phelps,* and Co. would have a Right to prove; it struck me at first, that as Judgment had been obtained, they would have no Right; but that Inference arose from a Mistake, viz. that as the original Debt was £1372:12*s*:10*d*. and the Judgment for £1530:6*s*:10*d*. the Certificate would not operate upon the Surplus: upon looking into the Subject, I think that makes no Difference; notwithstanding the Judgment is a new Debt, it must be considered as a Security for the original one; and the Question is, not whether the Assignee of the Judgment can himself prove, but whether he is not entitled to call upon *Conway, Phelps,* and Co. to prove for him. When he advanced the Money he purchased all their Remedies and Advantages, and therefore he is entitled to prove in their Names. His Proof must disturb nothing that has gone before; he shall be at liberty to prove against whatever constitutes a Fund for future Dividends, and shall receive a Dividend equal to those already paid to the other Creditors; or, if not enough for that Purpose, as far as the Fund will extend; he must have the Expences of this Application, and the Assignees must have their Costs.

Ordered accordingly.

Ex

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August.

Ex parte DE TASTET.—In the Matter of CORSON.

A. being an Indorsee of *B. C.* and Co.'s Acceptances for £1364, sues out a separate Commission against *B.* At the Time of suing out the Commission, *D.* the Person for whom *A.* had discounted the Acceptances, had, by Payments on account, reduced the Debt to £420. *A.* is entitled to prove for the whole Amount, and for all that is received above the £420 will be a Trustee for *D.*

ON the 12th of *September*, 1809, a separate Commission of Bankrupt was issued against *James Corson* (carrying on Business in Copartnership with *Jean Marynonail Villegille* and others, under the Firm of *Villegille, Corson,* and Co.) on the Petition of *Thomas Warren* and *Richard Bruce,* under which he was duly found and declared a Bankrupt, and the Petitioner *De Tastet* chosen his sole Assignee. *Warren* and *Bruce* were Creditors of *Villegille, Corson,* and Co. to the Amount of £1364, as the Holders of certain Acceptances which had been indorsed over to them by a Person of the Name of *Rimmer,* for whom they had discounted them; but they were not (nor was *Rimmer)* Creditors of *John Corson* on his separate Account. Other Bills of Exchange had been deposited with them by *Rimmer,* and they had also received certain Sums of Money on his Account, whereby the Debt actually due from him to them, at the Time of suing out the Commission, was reduced to £420; so that, for all that would be recovered on *Villegille, Corson,* and Co.'s Acceptances, above the Sum of £420, *Warren* and *Bruce* would be Trustees for *Rimmer.* They had been admitted by the Commissioners to prove for the full Amount of the Bills; and the Object of the present Application was, that their Proof might be reduced to £420, that it might stand for the Purpose of assenting or dissenting only; and that the Commissioners might be directed to enquire what Sum was due to *Warren* and *Corson* at the Time of suing out the Commission.

The Lord CHANCELLOR, after stating the Substance of the Petition, delivered his Judgment as follows:—

This

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This is a Point of very great Importance, and has never, in fact, occurred before; when a joint Creditor takes out the Commission, he is considered as a separate Creditor, and is the only joint Creditor who can come in with the separate Creditors, and receive Dividends with them *(a)*: this is a singular State of the Law; *Rimmer* would have been a joint Creditor if he had not handed over these Bills; and *Warren* and *Bruce* hold them only as a Security for £420; which Bills, if they had not come into their Hands, would not, as against the separate Creditors, have been admitted to be proved, and, when they have received what is due on the Bills, they will have received all that is due to them. But they are the legal Holders: the Bills of Exchange will be discharged by Operation of the Certificate, and they must be considered as Trustees. It is, in truth, introducing two joint Creditors: I have considered it again and again, and particularly the Judgment *Ex parte Crisp*, in *Willes'* Reports *(b)*, and am of Opinion, that the legal Right must decide the Question; as the Commission is in the Nature of an Execution for a legal Debt, all the Consequences attached to that must follow; they must take their legal Dividends, and, as to the Trust afterwards, the Commissioners have nothing to do with it.

(a) Ex parte Taitt, 16 *Ves.* 193. *Ex parte Dewdney*, 15 *Ves.* 499. *Ex parte Ackerman*, 14 *Ves.* 604. *Ex parte Chandler*, 9 *Ves.* 35. *Ex parte Hall*, *ibid.* 349.

(b) Ex parte Crisp, *Cooke's* B. L. 17. *Willes* Rep. 467.

Ex

1810.

August.

Ex parte PERRY AND ANOTHER.—In the Matter of ROWTON and MORRALL.

A Commission having issued in *London* against *A.* and *B.* Bankers at *Shrewsbury* and *Chester*, auxiliary Commissions directed to issue to those Places, for the purpose of taking the Proofs of Creditors holding Notes, under £20.

ROWTON and *Morrall* were Bankers at *Shrewsbury* and at *Chester*; and, on the 26th of *September*, 1810, a Commission of Bankrupt issued against them in *London*, under which they were duly found and declared Bankrupts. The Petitioners, *John Perry*, of *Chester*, and *Samuel Hartshorn*, of *Shrewsbury*, on behalf of themselves and all other the Creditors of the Bankrupts, holding their small Promissory Notes, prayed, that two auxiliary Commissions might issue; one to be executed at *Shrewsbury*, and the other at *Chester*, for the purpose of receiving the Proof of such Debts.

Ordered accordingly: and it was directed, that the Commissioners should be at liberty to receive Proofs for Debts under £20 only; such Proofs to be received as Proofs under the *London* Commission, to which the two other Commissions were to be merely auxiliary.

Ex parte SCOTT.—In the Matter of JUKES, LANGLEY, AND OTHERS.

S. P. but Liberty to examine the Bankrupt under such auxiliary Commission, refused.

THE Bankrupts were Bankers at *Gosport*. Two Commissions had issued against them, one at *Gosport*, and the other in *London*. On an Application to supersede the *Gosport* Commission, a similar Order was made as in the preceding Case.

Mr.

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Ex parte SCOTT.—In the Matter of JUKES, LANGLEY, and Others.

Mr. *Hart*, for the *Gosport* Creditors, pressed for liberty to examine the Bankrupts under the auxiliary Commission, which the *Lord* CHANCELLOR refused, observing, that such Examination would be nugatory; and that the Creditors at *Gosport* might easily instruct an Agent in *London* to conduct an Examination for them.

Ex parte HALL AND ANOTHER.—In the Matter of PALMER.

A. obtains Money from *B.* on the Security of Goods consigned to *B.*'s House in *America*, and shortly after becomes Bankrupt; *B.*'s Agent in *America*, ignorant of the Advances made, and of the Bankruptcy, remits Bills for the Proceeds of the Goods to *A.* *A.* delivers them to a Person, to get them accepted, who hands them over to *B.*; Petition praying that *A.* or the Assignees, might be directed to indorse them, dismissed with Costs, on the Ground of Jurisdiction.

THE Petitioners in this Case carried on Business as Factors in *London*, under the Firm of *John Hall* and Co.; and also in *America*, under the Firm of *Fleming* and *Hall*. *Palmer*, the Bankrupt, was in the Habit of occasionally consigning Goods to the House of *Fleming* and *Hall*, in *America*, which Goods were sold by them, and the Proceeds remitted to *Palmer*. Some Time in the Year 1809, soon after *Palmer* had made the last Consignment of such Goods, and before any Intelligence had reached *London* of their Sale, *Palmer* applied to the Petitioners, and requested them to accept Bills on the Security of the Consignment. The Petitioners accordingly accepted four Bills, amounting together to the Sum of £2681:8*s.* and paid them as they respectively became due. *Palmer*, shortly after, became Bankrupt. The House of *Fleming* and *Hall*, in *America*, ignorant that the Petitioners had made such Advances, and of the Bankruptcy of *Palmer*, remitted to him three Bills to the Amount of £2000,

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Ex parte HALL and Another.—In the Matter of PALMER.

£2000, on Account of the said Goods. *Palmer* delivered the Bills to a Person to get them accepted, who handed them over to the Petitioners; they had got them accepted; but Payment had been refused when due, on account of the want of *Palmer*'s Indorsement. The Petitioners prayed that they might be declared entitled to the Bills, and might be permitted to use the Name or Names of *Palmer* or his Assignees, in bringing Actions on them against the Acceptors, or that *Palmer* or his Assignees, or both of them, if necessary, might be directed to indorse them *(a)*.

Mr. *Cullen*, in support of the Petition, and for Costs, cited *Ex parte Dumas (b)*, *Ex parte Oursell (c)*.

Sir *Samuel Romilly*, and Mr. *Giffin Wilson*, for the Assignees.

The Lord CHANCELLOR.

Whatever might have been the Practice in Lord *Hardwicke*'s Time, it has been admitted for these last Twenty-five Years, that there is no such Jurisdiction in Bankruptcy; it has been the usual Practice to make the Objection, and to submit at once; and I am well aware, how careful I ought to be in extending a Jurisdiction admitting

(a) That a Bankrupt may, after Act of Bankruptcy, indorse a Bill delivered before for a *bonâ fide* Consideration, *vide Esp. Ni. Prius*, 30. *Peake*, *N. P.* c. 50. *Selwyn* 352. *Ex parte Greening*, 13 *Ves.* 206. That a Payee of an Accommodation Bill may indorse it. although it has been parted with after Act of Bankruptcy, and the Indorsee for a valuable Consideration recover on it against the Acceptor. *Vide* 1 *Camp. N. P.* Rep. 45.

(b) 2 *Ves.* 586. 1 *Atk.* 232.

(c) *Amb.* 297. *Cooke's* B. L. 378.

no

no Appeal. I may interpose by Consent; and, if Parties, waiving the Benefit of the Objection, afterwards should refuse Obedience to the Orders, I would commit them: there are many Cases where the Court has Jurisdiction merely by Consent. This is not a Case where the *Chancellor* is making Order for the Distribution of the Bankrupt's Property amongst the Creditors, but as to others, who are not bound to submit to the Jurisdiction. Lord *Thurlow* would not have entertained Jurisdiction for a Moment *(a)*.

Petition dismissed with Costs.

(a) Vide, Ex parte Rowton, post.

Ex parte ROWTON.—In the Matter of BRICKWOOD.

ON the 6th *July*, 1810, *Brickwood* and Co. Bankers, in *London*, stopped Payment, and a Commission of Bankrupt issued against them, under which they were found and declared Bankrupts. At the Time of their stopping

A. and *B.* Bankers in *London*, have, at the Time of their Bankruptcy, Cash and short Bills belonging to *C.* and *D.* Bankers in the Country. The Cash was the Excise Duties, received and remitted by the Country to the *London* Bankers, and against which they had given to the Commissioners the latter's Acceptances; in respect of these an Extent had issued. The Crown has a Right to elect against what Securities they will go, and on the Consent of the *Attorney-General*, the short Bills ordered to be delivered up.

Whatever it is necessary to decide collaterally to the Point of Proof, will give Jurisdiction in Bankruptcy.

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Ex parte ROWTON.—In the Matter of BRICKWOOD.

stopping Payment, the state of Accounts between them and the Petitioners, who were Bankers at *Chester*, was as follows:—Cash Balance, in favor of the Petitioners, £25,272:12s:9d.; and short Bills to the Amount of £20,591:15s:4d.: on the other Hand, the Petitioners had obtained and paid away the Bankrupts Acceptances to the Amount of £26,070:11s:3d. Of these Acceptances, Part, to the Amount of £21,339, had been paid to the Commissioners of Excise, for Duties received by the Petitioners, and remitted to the Bankrupts, and forming Part of the Cash Balance of £25,272:12s:9d. in their Hands. In respect of this an extent had issued. The Petitioners stated their readiness to set-off the Cash Balance due to them, against the outstanding Acceptances of the Bankrupts, and to leave in the Hands of the Assignees £797:18s:6d. to cover the Difference *(a)*. Subject to that, however, they claimed the Delivery of the short Bills, and the Proceeds of such of them as had fallen due and been received by the Assignees.

Mr. *Leach*, and Mr. *Montague*, in support of the Petition.

The Petitioners, on paying to Messrs. *Brickwood*'s Estate the Sum of £797:18s:6d. the Difference between the Amount of the Cash Balance in their favor, and the Bills accepted by the Bankrupts, are entitled to have these short Bills delivered up. Bankers have no Property in short Bills deposited with them, they hold them merely as Agents; and the Extents which have been issued do not affect the Right of the Petitioners to have the short Bills returned

(a)

Accep.	£26,070:11:3
Cash Bal.	25,272:12:9
	£797:18:6

returned to them. The Assignees cannot be in a better Situation than the Bankrupt himself. (The Lord *Chancellor.* Have the Petitioners proved?) No.

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The Lord CHANCELLOR.

Then what Jurisdiction have I between Persons who have not come in under the Commission, and the Assignees? The Petition presents a Case in which I cannot interfere; it is merely asking the Court for its Opinion: I can make no Order but by Consent; let the Petition stand over till you get the Consent of the Assignees.

On this Petition's coming on again, Mr. *Hart,* Sir *Samuel Romilly,* and Mr. *Trower,* for the Assignees, stated, that however willing they were to assist the Petitioners, they could not consent to put themselves within the Jurisdiction, unless they were relieved from the embarrassed Situation they were in, by the Operation of the Extents. A Consent, on the Part of the Crown, to the Delivery of the short Bills was then put in; but being objected to as not being sufficiently full, the Petition stood over again for the Purpose of getting it amended; on the next Day, the amended Consent being produced, Mr. *Hart* for the Assignees objected that the Extent must be actually withdrawn. *August* 18.

The Lord CHANCELLOR.

The Extent is virtually withdrawn, by the Consent of the *Attorney-General;* yet I cannot act upon that, I must consider the Possibility of the Crown's enforcing it: if the Assignees insist on the Objection, I cannot proceed *(a).*

On

(a) Mr. *Montague* now contended, that independent of the Consent of the Assignees, his Lordship was fully competent to decide; that the *Chancellor's* Jurisdiction extended

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On this Petition's coming on again, it was stated, by Mr. *Montague*, that several of the Bankrupt's Acceptances having fallen due, the Petitioners, as the Drawers, had been obliged to take them up; and, therefore, now stood (after allowing for the Difference between the Cash Balance and the Acceptances) in the Situation of Creditors, entitled to prove under the Commission: and on Mr. *Montague*'s undertaking to file an Affidavit of that Fact, the *Lord* CHANCELLOR, after making Enquiry into several Items of the Accounts, proceeded to observe, that supposing there had been no Bankruptcy, the Petitioners would be entitled to say to Messrs. *Brickwood* and Co. these short Bills, deposited in your Hands, belong to us: you have a Lien on them till the whole Account between us is right; but upon a due Application of the Cash Balance to the Acceptances, and providing for the Difference betwen them, we are entitled to have them delivered up *(a)*. This would have been the Case if no Bankruptcy had taken place, and the Assignees can be in no better Situation than the Bankrupts themselves would have been. Now, as to the Effect of the Extent; the Opinion of the Court, in other Cases has been, that when the Crown had taken Acceptances, not due at the Time of the Bankruptcy, the Crown had given Credit; and, therefore, the

tended to every thing in Bankruptcy; that the Assignees did not dispute the Facts; that *they* were always amenable to his Jurisdiction, and the Petitioners who were the only Strangers had submitted to it: that the Assignees, if the Extent had not issued, would have had no Claim to the short Bills, and the Right of the Crown to 20*s*. in the Pound, would not put them in a better Situation than they otherwise would be.—His Lordship said he should consider what had fallen from Mr. *Montague;* and should look into the Accounts between the Bankrupt and the Petitioners.

(a) Giles v. *Perkins*, 9 *East*. 12.

Assignment

Assignment of the Commissioners had prevailed over the Extent, as in the Case of the *Attorney-General* v. *Bebb (a)*, in the *Exchequer*. But, I think, there is a vast Difference between Acceptances generally, and where Money, the Property of the Crown, can be proved to have been specifically remitted. I remember a Case to that Effect about thirty Years ago, in the *Exchequer*, and considering the Nature of Extents, it is a Question, whether the Commissioners of Excise can alter the Consequences of a Debt to the Crown; but I must do the Officers of the Crown the justice to say, they are less inclined to litigate nice Points, than any set of Creditors whatever.—Still the Question is, what is the Law? and of that, I think, there can be little Doubt that the Crown has a Right to elect between the Securities which present themselves; and unless the Assignees can meet me on the Point of Jurisdiction, they can have nothing to object. An Affidavit is promised by Acceptances having been taken up by the Petitioners as the Drawers. I will not put them to amend their Petition, or defer my Judgment on that Ground. Upon Consideration, I am of Opinion, that I have the Jurisdiction without such Amendment; any thing that is necessary for me collaterally to decide in order to the Question of Proof, will give me Jurisdiction, and as far as the Assignees are concerned, they are under the Statutes already amenable. I, therefore, direct that the short Bills be delivered up.

The Order, stating a Consent on the Part of the Crown, directed that the short Bills, or the Proceeds of such as has been received, should be delivered up.

(a) By a recent Case in the *Exchequer* (the *King* v. *Dawson*,) the Decision of the Court in the *Attorney-General* v. *Bebb*, has been confirmed.

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Aug. 11. *Ex parte* ISBESTER.—In the Matter of ASTLEY.

A. the Payee of a Bill of Exchange indorses it in Blank and delivers it *B.*; *B.* writes above the Blank Indorsement, pay *C.* or order; *B.* takes up the Bill after a Commission of Bankrupt has issued against the Acceptor: Petition that he may be at liberty to prove it under the Commission dismissed, with an Offer of a Case.

THE Facts appearing on the Statement of this Petition, were as follow: *Bell* drew a Bill of Exchange for £400, payable to his Order, upon *Astley*, the Bankrupt, who accepted it: this Bill was indorsed in blank by *Bell*, and delivered to the Petitioner, who discounted it with *M'Cullum*, but did not indorse it over to him otherwise than by writing above *Bell's* blank Indorsement, "Pay *M'Cullum* or Order." On the 27th *January*, 1810, the Day the Bill became due, *Isbester* paid £300 in part of it; and on the 1st *February*, after the Commission had issued against *Astley*, and under which he was found a Bankrupt, the remaining £100; *M'Cullum* then re-delivered the Bill to the Petitioner, who struck out the Words, "Pay *M'Cullum* or Order," leaving on the Bill the blank Indorsement by *Bell*. The Petitioner had applied to prove the Bill under the Commission, and had been refused; and he now prayed that he might be admitted to prove and receive a rateable Dividend.

Mr. *Cooke*, in support of the Petition.

A Bill of Exchange is a Debt from the Date, and if it does not disturb any Equity between the Holder and the Bankrupt, may be proved as a Debt from that Time; if a Bill of Exchange comes into the Hands of a Party after an Act of Bankruptcy, it is sufficient to constitute a petitioning Creditor's Debt; *Macarty* v. *Barrow (a)*, *Bingley* v. *Maddison (b)*, *Glaister* v. *Hewen (c)*, and being

(a) 2 *Strange*, 949.
(b) *B. R. Mich.* Term, 1783. *Cooke's* Bank. Laws, 20.
(c) 7 T. R. 498.

sufficient

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Ex parte ISBESTER.—In the Matter of ASTLEY.

sufficient to found a petitioning Creditor's Debt it may be proved under the Commission; it would be hard that he should be barred by the Certificate, and yet not have a Right to prove. The Objection, if any, is to the Form in which the Proof should be made; *M'Cullum* might have proved, and transferred the Dividends. *Isbester* was *bonâ fide* Holder of this Bill, before the Date of the Commission, and paid it away without indorsing it, it has now got back into his Possession: why is he not remitted to his Right?

Sir *Samuel Romilly*, and Mr. *Agar*, on the other Side.

The Question is, whether a Person who has paid a valuable Consideration for a Bill, after a Commission of Bankrupt has issued, and who had no Connection with the Bill at the Time, is entitled to prove: it has been said, that a Debt, which supports a Commission, is a Debt which ought to be proved; the Analogy is very strong, yet it is not sufficient: there are many Anomalies in the Bankrupt Laws; the Court has made a Distinction between petitioning Creditors and other Creditors; a joint Creditor may support a separate Commission, yet joint Debts cannot be proved under it *(a)*. The Inconveniences would

(a) The present Practice is, that joint Creditors, with the Exception of a joint petitioning Creditor, can prove under a separate Commission, only for the Purpose of assenting to or dissenting from the Certificate, and receiving a Dividend out of the Surplus, after the Satisfaction of the separate Creditors. But if there are no joint Effects, and no solvent Partner; or no separate Debts, or the joint Creditors will pay the separate Creditors 20*s.* in the Pound, they may then vote in the Choice of Assignees, and go at once against the separate Estate. *Ex parte Taitt*, 16 *Ves.* 194, and the Note there. *Ex parte De Tastet*, *ante*, p. 10.

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be very great if a negotiable Security could pass from the Holder after the Commission, and a Person, who was no Creditor at the Time, prove the Debt: suppose a Number of Persons having Debts not separately sufficient for any Purposes under the Commission, were to put them into the Hands of one Person, or a Creditor having a large Debt were to divide it. *Ex parte Brymer (a)*, is the only Case approaching to this; but there, *Span* had indorsed the Bill. *M'Cullum* could not have recovered from *Isbester* upon the Note. If a Party could transfer after the Commission, there would be no set-off in Bankruptcy.

Mr. *Cooke*, in Reply.

This is a Debt fairly due from the Bankrupt's Estate to somebody and ought to be proved. This is not a Question of Law whether a Sum of Money shall be taken from the Bankrupt's Estate; but whether Creditors shall avail themselves of what they are not in justice entitled to. I never expected to hear more of the Cases of *Brooks* v. *Rogers (b)*, and *Howis* v. *Wiggins (c)*. Lord *Loughborough* has decided over and over again here, contrary to his Decisions in the *Common Pleas*; *Ex parte Seddon (d)*, *Cowley* v. *Dunlop (e)*, *Buckler* v. *Buttivant (f)*, *Houle* v. *Baxter (g)*, *Joseph* v. *Orme (h)*. The great Point of Sir *Samuel Romilly's* Argument is the Inconvenience. The Distinction mentioned of a joint Creditor being allowed to sustain a separate Commission, and joint Debts not being proveable under it, is a mere Matter of Arrangement and Convenience, and not of Law. *Isbester* could

(a) *Cooke's* B. L. 165.
(b) 1 *H. Bl.* Rep. 640.
(c) 4 T. R. 714.
(d) *Cooke's* B. L. 165.
(e) 7 T. R. 572.
(f) 3 *East*. 72.
(g) 3 *East*. 177.
(h) 2 New Rep. 180.

have

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have been compelled to pay the Money—if a Man transfers a Bill for a valuable Consideration, without putting his Name to it, he is liable in an Action for Money had and received, (*Chitty* on Bills of Exchange, p. 123); and nothing is more common at Law than in Declarations on Bills of Exchange to recover on the common Counts. As to the Objection on the Ground of set-off, a Bill of Exchange transferred after it is due, cannot defeat any Claims subsisting against the Holders at the Time of the transfer. The Petitioner can safely swear to the Debt. The Form of the Oath is a common printed Form, not applicable to many Cases which frequently occur, and written Forms applicable to the Nature of the Debt have been adopted by the Commissioners in some Lists. If the Creditor cannot swear in the Form of the Oath there is no Reason why the Form should not bend to the Justice of the Claim.

The Lord CHANCELLOR.

There are many Cases in which no Relief can be given in Bankruptcy, though Cases of very plain Justice. The Petitioner could have compelled *M'Cullum* to have proved this Bill, subject to the Equities subsisting between the Bankrupt and *M'Cullum;* but when he paid the Money he could sustain no Proof himself. All the Cases of Parties paying Bills after a Commission of Bankruptcy, have been where the Party claiming to prove has been himself liable on them. There is great Difference between transferring a Bill without putting your Name to it, and indorsing it; in the one Case it is a Sale, and in the other a Discount, subject, however, to the Question of Intention, whether the Transfer was meant to take effect as a Sale, or by way of Discount. At the Time of the Commission, was the Petitioner liable, in respect of this Bill? Could an Action have been brought against him on it? if not, I do not think his voluntary Interposition can make any Difference.

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Ex parte ISBESTER.—In the Matter of ASTLEY.

There is a great Distinction between an Action lying for the Money, and admitting *Isbester* as a Creditor under the Statute *(a)*. Is there any Case, where not having contracted a Liability on the Bill, you can afterwards take it up and become a Creditor? There is a Doubt upon the Petition and Affidavit, whether this was intended as a Sale or a Discount of the Bill. You may take a Case, if you think proper, for the Opinion of a Court of Law; whether, under all the Circumstances, this is a Debt proveable under the Commission *(b)*?

(a) 5 *Geo.* 2. c. 30.

(b) *Vincent* v. *Horlock*, was an Action on a Bill of Exchange under precisely the same Circumstances as to the Indorsement, as those stated in this Petition. Lord *Ellenborough* held that a Party so writing "pay, &c." above the blank Indorsement, contracted no Obligation on the Bill, and the Plaintiff was nonsuited. 1 *Camp. N. P. Rep.* 442. That a Person giving Cash for a Bill without the Indorsement of the Person from whom he takes it, cannot prove it under his Commission. *Vide Ex parte Shuttleworth*, 3 *Ves.* 368.

1810. *August.*

Ex parte ————.

MR. *Cooke* requested that this Petition, which had been just called on, might stand over.

Sir *Samuel Romilly* opposed it.

The Lord CHANCELLOR,

After adverting in strong Terms to the very great Inconvenience and Expence occasioned by Petitions thus being delayed;

delayed; desired it might be distinctly understood, that he would not, in future, grant any such Application, unless upon Payment of the Costs, by the Party at whose Instance it should be made.

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Ex parte

Ex parte CRAGGS.—In the Matter of DYSON.

THIS was an Application that the Messenger under a Commission of Bankrupt issued against *Dyson*, might be directed to deliver up Possession of the House, and be restrained from selling Goods which he had seised as the Property of the Bankrupt; but which was claimed by the Petitioner under a *bonâ fide* Sale to him.

No Jurisdiction in Bankruptcy, to order Goods seised by the Messenger to be delivered up to a Person claiming them as his.

Mr. *Richards*, and Mr. *Johnson*, in support of the Petition contended, that notwithstanding an Action might be brought, the *Lord Chancellor* had Jurisdiction to make the Order.

Sir *Samuel Romilly*, on the other Side, insisted that his Lordship had not the Jurisdiction, and that the Circumstances of the alleged Sale were very Suspicious.

The Lord CHANCELLOR.

This Court will receive Complaint of a Messenger's Misdemeanor; but if in the Discharge of his Duty he takes Possession of Goods as the Property of the Bankrupt, I do not know that it ever entertained Jurisdiction on the Application of a Person, claiming the Goods to be delivered up to him. I do not say there may not be Cases

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Ex parte CRAGGS.—In the Matter of DYSON.

Cases in which the Court would interfere to decide a Question of Property with Third Persons, as where the Assignees are wasting the Effects in endeavouring to recover what they would not be able to retain.—This Petition can not be maintained *(a)*.

(a) Ex parte, Page, ante, p. 1.

Ex parte LANGSTON —In the Matter of KNIGHT.

A. borrows £4000. from *B.* and deposits Title Deeds as a Security for that Sum. He afterwards obtains further Advances, and after an Act of Bankruptcy, signs an Agreement subjecting the Deposit to such further Advances. *B.* declared to be entitled to a Lien for the whole Amount.

ON 15th *June*, 1809, *Edward Knight*, the surviving Partner of the Firm of *Joseph* and *Edward Knight*, (*Joseph* being then lately deceased) and *Henderson* the Executor of *Joseph*, applied to Messrs. *Langston, Towgood* and Co. the Petitioners, for the Loan of £4000. for the Purposes of the said Firm, and until *Henderson* should have obtained the Probate of *Joseph's* Will, and have sold out Part of his Stock; and they deposited with them the Title Deeds of certain Leasehold Premises, which were the joint Property of *Joseph* and *Edward Knight*. The Petitioners advanced the Money, and gave a Receipt for the Lease, as deposited with them, by Way of collateral Security for the Money so advanced: on the 17th, *Edward Knight* applied for further Advances, which he promised to repay on the 20th, when the Transfer of the Stock would be made, and on the Petitioners expressing some Reluctance, he observed that they ran no Risk, as the Leasehold Premises, of which they held the Title Deeds, were worth from £7000 to £8000.; they accordingly advanced him £3300 more: on the 20th *June, Edward Knight* committed an Act of Bankruptcy, and the Petitioners

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Ex parte LANGSTON.— In the Matter of KNIGHT.

Petitioners recollecting that the legal Estate of the Premises was in him, applied to him to confirm their Security. A Memorandum was accordingly drawn up and signed by *Knight*, stating that the Title Deeds had been deposited as a Security for £4000, and that on the Security thereof, other Advances to the Amount of £3300 had since been made; the said *Edward Knight* agreed to change the Title Deeds with the Payment of the Money aforesaid, and ratified and confirmed the Security for the same.

The Petitioners prayed that they might be declared to be entitled to the Money which should be produced by the Sale of the said Premises, and be admitted to prove for the Residue.

Sir *Samuel Romilly*, in support of the Petition.

Sir *Arthur Piggott*, and Mr. *Trower*, for the Assignees, contended, that the Lien ought not to be extended beyond the Sum of £4000.

The Lord CHANCELLOR.

This Paper, signed after the Act of Bankruptcy, committed on the 20th *June*, if inconsistent, is strong conclusive Evidence against the Claim of the Petitioners, if consistent, it will not strengthen it, but it ought not to operate to their Prejudice: on the 15th *June*, *Edward Knight*, as the surviving Partner of *Joseph Knight*, with the Consent of his Brother's Executor, pledges all the Leasehold Property as a Security for £4000 then advanced by the Petitioners, and on the Security whereof, other Advances have been since made to the Amount of 3300. There is not Evidence that the further Advances were made on the Security of the Leasehold Premises, but there is nothing contradicting

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contradicting the Fact of Advances having been made on the said Premises; *Edward Knight* agreed to make further Security, and by this Paper, signed after the Bankruptcy, he ratifies and confirms that Agreement; this, as it is not hostile to the original Agreement, does not affect the Title Deeds, nor does the Affidavit assert any thing which the Paper contradicts. A Deposit is a Security for Money advanced, the Purpose being to charge the Estate; it is not to be inferred that further Advances are not to be charged, if made out by the Oath of the Party uncontradicted, that the additional Sum is to be a further Charge: it is not likely they should propose a Loan without any Security, in ordinary Transactions between Man and Man, one would not apply for a Loan without Security; then what is the Return of this Case? On the 17th, the Bankrupt saw *Towgood*, the Partner of *Langston*, and said he should want about £2000 more, to be repaid on *Tuesday*, when *Henderson*, the Executor, should have sold some of his late Brother's Stock, with an Assurance, in case it should not be repaid on *Tuesday*, that the Premises were worth from £7000 to £8000. This led to an Expectation on *Tuesday*, and the further Advance was made on full Confidence that the Security would protect it. It cannot be denied that the Representation of a Man borrowing may constitute an express Agreement by Parol; the Money not being repaid on *Tuesday*, the Petitioners recollecting that the legal Estate of the Premises was in *Knight*, called for a Confirmation of their Security; in this Ratification there is nothing inconsistent with the Case made in the Affidavit. The Assignees did very right in coming here, but how can I say the Petitioners are not entitled.

Vide Ex parte Haigh. *Ex parte Wetherell*, 11 *Ves.* 398. 403. *Ex parte Comyn*, 9 *Ves.* 115. *Norice* v. *Wilkinson*, 12 *Ves.* 196.

Ex

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Ex parte JONES.—In the Matter of ALLEN. *Nov.* 16.

Country Bankers entitled to a Commission on the Discount of Bills, although sent to them from *London* by a Person resident there.

THE Petitioners, Messrs. *Jones* and *Wright*, were Bankers at *Feversham*, and they prayed to be admitted to prove two Bills of Exchange, one for £641, and the other for £840, under the Bankrupt's Commission. The Bankrupt carried on Business and resided in *London*, and he had sent the Bills in Question to the Petitioners at *Feversham*, in order that they might discount them; they, in return, remitted him Drafts or Bills payable at their Correspondents in *London*, deducting Interest at five *per Cent.* from the Time such Drafts were paid, and 2*s*: 6*d. per Cent.* for Commission. There was an Affidavit by *Wright*, that Interest had been computed only from the Time when their Bills in *London* were paid *(a)*; that they had at all Times charged 2*s*: 6*d. per Cent.*, which they believed to be the fair and usual Commission.

Mr. *Trower*, in support of the Petition, urged, that it had been decided, in many Cases, that Country Bankers had a Right to retain such a Commission for their Trouble in discounting Bills; that the Charge of 2*s*: 6*d. per Cent.* was reasonable; and that if there were any Doubt as to the latter Point, it was a fair Question to send to a Jury.

Mr. *Cooke*, on the other Side, said, that he did not mean to contend that Country Bankers were not entitled to a Commission, or that 2*s*: 6*d. per Cent.* was an unreasonable Deduction, or more than a Jury would allow; his Objec-

(a) For Want of an Affidavit to this Effect the Petition had been ordered to stand over from a former Day.

tion

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tion to the Petitioners Claim was made for the first Time; viz. that if a Person, resident in *London*, sends down his Bills to Bankers in the Country to be discounted, it is not a fair *bonâ fide* Transaction, so as to entitle them to the Commission, and that the taking it under such Circumstances was Usury.

The Lord CHANCELLOR.

I do not see how this Objection can be maintained. If you apply to a Country Banker to accommodate you with Funds in *London*, he is entitled to a reasonable Commission, what is or is not a reasonable Commission being a Question for a Jury. But it has been said if both Parties resided in *Feversham*, this Question would not have arisen: I do not see the Difference; if you, the *Feversham* Banker, will provide for my Bills in *London*, as you must have have Funds and Agents in *London*, the same Charge is incurred, and the same Reason applies in one Case as the other. If you connect it with any Collusion, I am ready to say it is usurious; but if there is nothing more than this, the Petitioners must take their Order *(a)*.

(a) Winch, q. t. v. *Fenn*, 2 T. R. 52, *n. Hammet* v. *Yea*, 1 *B.* & *P.* 144. *Et Vide Kent* v. *Lowen*, 1 *Camp.* Rep. 178.

Nov. 16. *Ex parte* HALL.—In the Matter of DICKENSON.

A Marriage celebrated in *Scotland* without Banns or Licence is good. And a Bond given by a Father by way of Settlement previous to a Re-solemnization of such Marriage here not sustained against Creditors under his Commission.

THIS was the Petition of *Henry Hall*, and *Harriet* his Wife, and it prayed that they might be at liberty to prove a Bond £2100, under the Commission which

had

had issued against *William Dickenson*, the Father of *Harriet*.

In *November*, 1807, the Petitioners being both at that Time under Age eloped together, and were married in *Scotland* without either Licence or Banns; *Dickenson*, having Doubts about the Legality of their Marriage, wished to have the Ceremony performed again. To this the Father of the Petitioner *Hall* objected; but was at length induced to consent, by an Offer of *Dickenson* to settle £105 per Year on his Daughter, which was equivalent to her Expectations under his *(Dickenson's)* Marriage Settlement. *Dickenson* accordingly executed a Bond to one *George Robertson* for securing the said Annuity, and the Marriage was solemnized according to the Forms of the Church of *England*; the Petition alleged, that, at the Time of executing the Bond, *Dickenson* was solvent, and the Annuity had been regularly paid till his Bankruptcy; that since the said Marriage, and in consequence of the Bond, *Hall* the elder had paid to his Son £400 a Year, and since the Bankruptcy had executed a Settlement in his Favor to that Amount. The Petitioners had applied to prove the Bond under the Commission, and had been refused.

Mr. *Hart*, in support of the Petition, argued, that, the Bond was granted for a sufficient Consideration. 1st, The Resolemnization of the Marriage, and 2dly, that the Annuity from *Hall* the elder to his Son, had been granted in Consideration of this Bond.

The Lord CHANCELLOR.

The Annuity having been given in Consideration of the Bond will not support it.

Mr.

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Ex parte HALL.—In the Matter of DICKENSON.

Mr. *Hart*.

Then it will depend upon the Question, whether the Marriage in *Scotland* was good; a Marriage of that Kind is not sufficient to satisfy the Court where its own Wards are concerned.

The Lord CHANCELLOR.

I have no Doubt the *Scotch* Marriage is good *(a)*; the Practice in regard to Wards of this Court is a Matter of prudence, and their Settlements being made under the Order of the Court, would be protected against Creditors. I feel a strong Wish to indulge these Petitioners, but I cannot, on the Grounds here stated. The Resolemnization of the Marriage is not sufficient, and it does not appear that in consequence of an Agreement with *Hall* the elder to grant the Annuity, *Dickenson* gave the Bond. If you can prove, such an Agreement, the Execution of the Settlement being after the Bankruptcy, is immaterial. The Petition is drawn in a way to induce me to guess at that Fact, but I cannot act upon Surmise. The Petitioners may prove upon the Surplus of the separate Estate, after the joint Creditors are satisfied *(b)*.

(a) *Ilderton* v. *Ilderton*, 2 *H. B.* 145. *Harg.* and *But.* 3 *Co. Lit.* 79 B. No. 1.

(b) It was a joint Commission against *Dickenson* and Another.

Nov.

Ex parte LAYCOCK AND OTHERS.

THIS was an Application that joint Creditors might be allowed to prove and vote in the Choice of Assignees under a separate Commission. It was a separate Commission

Commission taken out by a joint Creditor, and there was but one separate Creditor to the Amount only of £4. The petitioning Creditor made no Objection.

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Ex parte LAYCOCK and Others.

The Lord CHANCELLOR.

I do not recollect any Case where joint Creditors have been permitted to vote in the Choice of Assignees under a separate Commission *(a)*; but as the petitioning Creditor consents I will make the Order.

(a) Vide p. 21, *Ante, in notis. Ex parte Taitt*, 1 Ves. 193, and the Cases cited in the Note there.

Ex parte ROSS.—In the Matter of ROSS *(a)*. *Dec.* 8.

The Assignees are not under 5 *Geo.* 2. c. 30. entitled to detain from the Bankrupt, any Part of his Wearing Apparel, on the Ground of its being unnecessary: he himself being the Party to determine that, at the Risk of an Indictment: nor to refuse him the Inspection of his Books previous to his last Examination, on the Ground that such Inspection is with a fraudulent Object.

THE Prayer of this Petition was, that the Assignees might be directed to deliver up to the Bankrupt his necessary Wearing Apparel, and that of his Wife and Children; that he might be furnished with a List of Debts proved under his Commission; and be permitted to inspect his Books for the Purpose of passing his last Examination, and that the Assignees might pay the Costs.

(a) On this Petition being called on, Mr. *Montague* requested that it might stand over, on the Ground that there was an Affidavit on the Part of the Petitioner of very great Length, (the Office Copy of which would be £20 or £30) just put into his Hand, and which he wished to have an Opportunity of reading.

Sir *Samuel Romilly* offered to wave the Affidavit.

The Lord CHANCELLOR.

Sir *Samuel Romilly* has a Right to wave the Use of this Affidavit; and the Question of Expence not immediately affecting the Merits, may be met on another Application.

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Ex parte Ross.—In the Matter of Ross.

Sir *Samuel Romilly*, and Mr. *Johnson*, in support of the Petition.

Mr. *Leach*, and Mr. *Montague*, opposed it; 1st. As to the Wearing Apparel, on the Ground that the Bankrupt's Conduct towards his Assignees, as supported by Affidavit *(a)*, had been so fraudulent and improper as to forfeit all Claim to their Indulgence, or to the Interference of the Court; that he had Resources which placed him above the Necessity of such an Application, and the Petition was presented merely for the Purposes of Vexation and Expence. In regard to the other Parts of the Petition a List of Debts had already been delivered to him; and upon a former Application for liberty to inspect the Books, the *Lord Chancellor* confined the Order to the Inspection of the Proof of the petitioning Creditor's Debt, and he now desired an Inspection, not for the Purposes of his last Examination, but in order to defraud his Assignees of Remittances and Consignments which were expected.

Sir *Samuel Romilly*, in Reply, insisted that he had a positive Right under the Statute *(b)*, which the Impropriety of his Conduct, even if admitted, could not divest him of; and that the List of Debts was given after this Petition had been presented.

The Lord CHANCELLOR.

On opening this Petition I was of Opinion that it was necessary to consider the Question in two Points of View:

(a) An Objection was taken to the Affidavit of the Assignees. It was in Terms the Affidavit of the three, but it had been sworn to only by one. It was admitted to be read as the Affidavit of the one.

(b) 5 *Geo.* 2. c. 30.

1st.

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Ex parte, Ross.—In the Matter of Ross.

1st. As to the Right to Wearing Apparel, and the Inspection of his Books under the Statute *(a)*; and 2d. As to Costs. If he has a positive Right, then his Conduct can not affect it; I should wish to have it argued, as Matter of Law, whether his Conduct can deprive him of his Wearing Apparel, or his Right to inspect the Books be taken away, on the Ground of Intent as to the Object with which he seeks to inspect them.

Mr. *Leach*, and Mr. *Montague*. The Words of the Statute are *necessary* Wearing Apparel; and whatever his Conduct may be, it must be admitted, that he is entitled to that, and also to his Books for the Purposes of his last Examination; but he is not entitled to his Wearing Apparel if it cannot be considered as necessary, or to the Inspection of his Books if it appear that he Claims such Inspection for other Purposes than those of his last Examination. He has not sworn that this Apparel is necessary, and the Assignees have stated, in their Affidavit, that it is not. If he had twenty Wardrobes it never could be the Intention of the Legislature that he should keep them all; and it has been decided under the Insolvent Debtor Acts, that a Person in that Situation is entitled to retain only what is necessary for his decent Appearance in the World. As to the Inspection of his Books, the Object with which he now applies for that, has already been stated; that it is discretionary in the Court to grant or refuse such an Application, may be inferred from your Lordship's having, on a former Application of this Bankrupt, confined your Order to the Inspection of the petitioning Creditor's Debt under the Commission.

The Lord CHANCELLOR.

My Order on that Occasion was made *diverso intuitu*;

(a) 5 *Geo.* 2. c. 30.

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Ex parte Ross.—In the Matter of Ross.

an Issue had been directed to try the petitioning Creditor's Debt, and he could not have inspected it without that Order.

Argument.

He states that he wants the Inspection for the Purpose of investigating Debts, of which he has already had a List sent to him free of all Expence; as to that, therefore, his Petition has unnecessarily introduced Matters in which he cannot have Relief, and therefore by the Rule of this Court it must be dismissed altogether.

The Lord CHANCELLOR.

The Question, as to the Wearing Apparel, resolves itself into this; whether if he were at his last Examination he would be bound to deliver it up, or if he did not, would be Guilty of Felony. On the Trial of such an Indictment, a Judge would feel it is Duty to direct the Jury, to find, as to the Wearing Apparel, the Fact, whether necessary or not. If he had it now in his Possession, could I order him to deliver it up, when the Bankrupt is under the Statute *(a)*, the Party who is to determine that Point for himself, at the Hazard of his Life. The Act of Parliament gives the Right in this Way; he is at his last Examination to deliver up to the Commissioners, his Goods, Wares, Merchandizes, Money, Estate, and Effects, his necessary Wearing Apparel, and the necessary Wearing Apparel of his Wife and Children, only excepted; and in case he shall conceal or embezzle any Part of such his Estate, he shall be deemed Guilty of Felony, and shall suffer Death without Benefit of Clergy. It has been said, that he has in his Possession, Property of the Assignees; but what Answer is that to this Claim? Could

(a) 5 Geo. 2. c. 30.

I, on

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I, on an Indictment for having withheld Wearing Apparel, above £20, direct the Jury to acquit him of that, and find him Guilty of having embezzled other Property? Next, as to the Question of inspecting the Books; the Act directs that the Bankrupt shall be at liberty to inspect his Books, and to take with him such Persons as he shall think fit, the better to enable him to make a true Discovery and Disclosure of his Estate and Effects. Can I say, that he shall not have the Liberty the Statute has given him, because you suspect he wants it for another Purpose?

It has been observed at the Bar, that the Court is frequently in the Habit of dismissing Petitions containing a great Variety of Matter, when the greater Part of what is prayed is not made out. I lay out of the Question the List of Debts; it was reasonably asked, and has been furnished, and the only Point arising on that Part of the Petition is, as to Costs depending on the Fact, that when a List was applied for, no Answer was given to the Letter, although a List has been given since the Order in this Petition was served; but no Answer having been given to the Letter, it was not improper that the Application for a List of Debts should remain Part of the Petition. That being disposed of there remain the other two Points, and, I think, it would be pressing the Rule of this Court too far, that on a Petition containing but two simple Points, I should not make an Order as to one, supposing that I could not make it as to the other. As to all that has been said on the Conduct of the Bankrupt, I ought to entertain no Opinion, except I can do it judicially; but supposing it to have been as fraudulent as it has been alleged, can I deprive him of what the Act of Parliament has given him as a Right, and given to him as to a Person represented to be as dishonest and fraudulent as a Man can be? Look at the Preamble of the Act, the whole of

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it has in Contemplation Persons acting with the most fraudulent and dishonest Intentions towards Creditors, and yet it does not subject them to Penalties, unless they persevere in such Dishonesty at their last Examination; and the Question is, whether upon Suspicion that he is as fraudulent a Person as the Preamble of the Act has in Contemplation, I can deprive him of the Privilege given by the subsequent Sections of it. In regard to the Inspection of the Books, the Legislature, though it could not compel a fraudulent Man to be honest, meant that you should not take away this fraudulent Man's Life, without affording him the Means of complying with the Terms of the Act; and, therefore, gave him Liberty to inspect the Books, and to take Extracts and Copies, and to bring with him such Persons, not exceeding two, as he should think fit. Mark the Expression, as he should think fit; the Legislature leaving it to his Discretion, in a Case where his Life was concerned, to select such Assistance as might best enable him to effectuate the full Discovery and Disclosure of his Effects. But it has been said, that his Object in inspecting the Books is fraudulent; the Legislature must have known that such might be the Consequence of this Indulgence, and yet it has in Terms leaving me no Discretion, enacted, that he shall have such Inspection; and if it rests as a Doubt, whether the Assignees are or are not willing to allow him this Inspection, my Opinion is, that be he as fraudulent as he may, they are not authorized to refuse him. If at his last Examination there should be any Property not delivered up, they have it in their Power to indict him; but on the other Hand he should be set right for the Purposes of his last Examination. As to the Wearing Apparel, I am hurt that my Judgment can derive no Assistance from Decision. The Construction of the Insolvent Acts afford no Assistance, and the Difficulty can only be decided on an Indictment under the Statute

Statute *(a)*. But I do not think that the Assignees are warranted in withholding from him, merely on their Opinion, what the Law allows him to determine on the Propriety of keeping at the Peril of his Life. I have looked into so much of the Affidavits as relate to the Conduct of the Parties in regard to these Applications and Refusals; and think there should be no Costs. The Order must be to deliver up the Wearing Apparel, without Prejudice to the Question, whether necessary or not; and Liberty to inspect the Books according to the Statute.

(a) 5 *Geo.* 2. c. 30.

Ex parte JONES.—In the Matter of GARRAT.

SIR *Samuel Romilly*, and Mr. *Wingfield*, on the Part of the Petitioner, applied for an Order requiring the Commissioners to direct their Messenger to bring before them, one *Mary Anguish*, the Servant of the Bankrupt, who was a necessary Witness to prove the Act of Bankruptcy: she had been summoned, and did not attend; and the Commissioners doubted their Authority to compel her Attendance.

The Lord CHANCELLOR.

Of their Authority the Commissioners are to judge for themselves; but there ought to be a Power some where to compel the Attendance of a Witness to this Fact, and there must have been many Orders for that Purpose. My Order, in the Terms of this Petition, would be no Protection to the Commissioners against an Action; you may

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Ex parte JONES.—In the Matter of GARRAT.

take an Order on *Mary Anguish* to attend the Commissioners, at such Time and Place as they shall appoint *(a)*.

Ordered accordingly.

(a) Vide Ex parte Lund, 6 *Ves.* jun. 781. *Ex parte Higgins*, 11 Vol. 8. The Stat. *Jac.* 1. c. 15. gives the Commissioners Power to commit Persons refusing to be sworn, and make Answer touching the Bankrupt's Estate and Effects: this Power is adopted by the Stat. 4 and 5 *Ann.* c. 17.—and 5 *Geo.* 2. c. 30. But there does not appear to be any Punishment, in case a Witness refuses to obey the Commissioners Summons to prove the Act of Bankruptcy or the Trading. *Cooke's* B. L. 110.

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THORPE *v.* GOODALL.

A Bill in Equity will not lie to compel a Bankrupt to execute a Power in favor of his Creditors.

THIS was a Bill filed by the Assignees of a Bankrupt, praying that he might be decreed to execute a Power of Appointment for the Benefit of his Creditors.

The Case on the Bill was, that *Francis Goodall*, deceased, for several Years before *December* 1788, lived and cohabited with *Johanna Burrowes*, deceased, and had Four Children by her, viz. *Thomas*, the Defendant, *Michael*, *Johanna*, and *Frances*.

Francis Goodall being seised of certain Freehold and Copyhold Estates, and *Johanna Burrowes* of certain other Estates, and a Marriage being agreed on and intended to be had between them, it was agreed, that for the Purpose

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Purpose of making a Provision, as well for the Four Children which they then had, as for any future Children they might have, that they should and would release, convey, and surrender the several Estates and Premises, of or to which they were so respectively seised and entitled, to certain Purposes therein after mentioned, and accordingly by a certain Indenture of Covenants bearing Date 31st of *December*, 1788, between *Francis Goodall*, of the First Part, *Johanna Burrowes*, of the Second Part, and certain Trustees, of the Third Part, they covenanted and agreed with the said Trustees, that in case the Marriage should take effect, they would, within Six Months after the Solemnization thereof, settle, convey, and assure their several Messuages, &c. with the Appurtenances, to the Use of the said *Francis Goodall* for Life, Remainder to the Use of *Johanna Burrowes* for Life, with Remainder to the Use of said *Thomas Goodall*, *Michael Goodall*, *Johanna Goodall*, the Younger, and *Frances Goodall*, and all and every other the Child and Children which the said *Francis Goodall* should or might thereafter have by the said *Johanna*, his intended Wife, and their Assigns, during their several and respective natural Lives, equally as Tenants in Common, and from and after their several and respective Deceases; then, and as to the Share of each and every or any of them so dying, to the Use of such Person or Persons, and for such Estate or Estates, and to and upon such Uses, Trusts, Intents, and Purposes, and under and subject to such Provisoes, Limitations, and Agreements, and with or without Power of Revocation, as he, she, or they, so dying, by any Deed or Deeds, Writing or Writings, under his, her, or their respective Hand and Seal, to be duly executed in the Presence of and attested by Two or more credible Witnesses, or by his, her, and their last Will and Testament, signed, sealed, and published, in the Presence of and attested by Three or more credible Witnesses, should direct, limit, or appoint,

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appoint, give, devise, or dispose of the same; and in default of such Appointment, to the Heirs of his, her, or their respective Body or Bodies, lawfully to be begotten; and in case any one or more of them, the said *Thomas, Michael, Johanna*, and *Frances*, should happen to die, leaving no issue, and without Appointment, to the Use of all and every of the then born, and the then after to be born Children, in the same Manner as the original Shares were given, with the like Power of Appointment, and the like Remainder in default thereof; and if all should die except one, then the whole to such Survivor for his Life, with the like Power of Disposition, and with like Remainder; and in default of such Issue, then as to the Estates of the said *Francis Goodall*, to his right Heirs for ever; and as to the Estate of *Johanna Burrowes*, to her right Heirs for ever.

The Marriage shortly after took place, and a Settlement was made pursuant to the Articles. *Francis Goodall* and *Johanna* his Wife, both died without having had any Children of the Marriage.

On the 16th *November*, 1805, *Thomas Goodall* became a Bankrupt, and his Share and Interest, under the Settlement, was put up to sale and bought by *Frere*, but the Bankrupt refused to execute the Power of Appointment.

To this Bill the Defendant demurred.

Sir *Samuel Romilly*, and Mr. *Cullen*, in support of the Demurrer.

All that the Assignees are entitled to claim, is the *Interest* which the Bankrupt has; they cannot compel him to

to execute a Power. If they can, it is either by the express Words of the Bankrupt Statutes, or upon the Decisions in this Court upon the equitable Interpretation of the Statutes; it must be admitted the Statutes are to be construed liberally in favour of Creditors, but none of the Statutes, from that of *Henry* VIII. to 49 *Geo.* III. the first and last on the Subject of the Bankrupt's Property, compel the Bankrupt to do all the Acts he can do for the Benefit of his Creditors. A Power it is agreed cannot be assigned. In Cases of Real Estates it is only by virtue of the Bargain and Sale that the Assignees acquire any Interest, and a Bargain and Sale cannot convey the Benefit of a Power. The Stat. 5 *Geo.* II. speaks of an Interest the Bankrupt has, not a Power. The Stat. 34 and 35 *Henry* VIII. c. 4. expressly mentions Estates Tail, but it never could be considered that the Bankrupt could be under that Statute compelled to levy a Fine or suffer a Recovery. The Stat. 21 *James* I. c. 19. gives the Bankrupt's Estate Tail to the Assignees in Fee, it was necessary by express Act of Parliament to give to a Bargain and Sale the Effect of a Recovery. Suppose the Case of a Bankrupt, Tenant for Life, Remainder to Children unborn in Tail, Remainder to the Tenant for Life in Fee, and no Trustees to preserve Contingent Remainders; this Court would never compel the Bankrupt to alien, in order to destroy the Contingent Remainders. Lord *Townsend* and *Windham*, 2 *Ves.* *Holmes* v. *Coghill.* 7 *Ves.* jun. 499. 12 *Ves.* jun. 206.

Mr. *Richards*, Mr. *Hart*, and Mr. *Roupell*, in support of the Bill.

In Law we have no right to compel the Bankrupt; but in Equity we are entitled to it. The Bankrupt may To-morrow bar the Issue, and leave them no Benefit, and *non constat* that they will ever take any Benefit under this Deed

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THORPE v. GOODALL.

Deed. As to the Case put of the Omission of Trustees to preserve Contingent Remainders, Tenant for Life *ought not* to destroy Contingent Remainders, and this Court never commands a Wrong.

The Question is, whether a Person who can acquire the entire Interest for the Benefit of his Creditors, shall not be compelled to do it? There is no Instance where the Court being called on by Bill to do a formal Act for the Benefit of Creditors has refused it; by Stat. 21 *Jam.* I. c. 19. the Court is required to construe the Statutes beneficially for the Creditors; the Limitation to Uses created by the Execution of a Power not being so common formerly as now, is a *casus omissus* throughout the Statutes of Bankruptcy. An Estate for Life, with an unqualified Power of appointing the Inheritance, comprehends every thing. *Barford* v. *Street*, 16 *Ves.* jun. 135. *Sugden* on Powers, 152 *(a)*.

The Lord CHANCELLOR.

All that is included under the Word "Possibility of "Profit," passes to the Assignees *(b)*. This Power is either within or without the Act. If within, why bring your Bill? If without, why insist upon the Act? By the Statutes for the Relief of Insolvent Debtors, all Powers are expressly vested in the Assignees *(c)*. Has this Court

(a) Whether the Bargain and Sale of the Commissioners, will have the same Operation as a due Execution of the Power by the Bankrupt, is a Point not only undecided but concerning which there is hardly even a *Dictum* in the Books. *Vide Sugden* on Powers, 154. As to the Assignment of Offices. *Vide Cooke's* B. L. 283.

(b) 5 *Geo.* 2. c 30.

(c) *Vide* 49 *Geo.* 3. c. 115. s. 14.

ever,

ever, by direct Decree, compelled a Bankrupt to do an Act because he is a Bankrupt? The Creditors by Duress of refusing his Certificate, can compel him. I cannot see my way to compel the Execution of this Power, the Statutes must be construed liberally to effectuate what they direct to be done. I will look into the Subject, and if I change my Opinion will mention it To-morrow, otherwise this Demurrer must be allowed.

1811.
THORPE v. GOODALL.

It was not mentioned again.

Ex parte JACKSON.
Ex parte HEYWOOD.

1811.
Jan. 29.

THESE Petitions had been referred to the Master, and they now came on again upon Exceptions to his Report; one of the Exceptions relied on was, that the Master had admitted, as Evidence, the Affidavits which had been filed in support of the Petition *Ex parte Heywood*.

On a Reference of a Matter in Bankruptcy to the Master, Affidavits which might have been read at the Hearing of the Petition in Court, may be received in Evidence by him.

It was contended, that on a Reference of a Matter in Bankruptcy, the Master was bound by the same Rules of practice as on a Reference in a Cause.

The Lord CHANCELLOR enquired whether the Affidavits had been originally before him, and being answered in the Affirmative, proceeded as follows:

I doubt the Analogy which has been contended for between Proceedings in Bankruptcy, and the other Proceedings in this Court. The whole of the Proceedings in Bankruptcy begin in Transactions upon Oath: the Trading,

1811.
Ex parte JACKSON.
Ex parte HEYWOOD.

Trading, the Debt, the Act of Bankruptcy, and the Proceedings in this Court, are always originally on Affidavit. It is always in the Discretion of the Court, upon an Issue, to direct the petitioning Creditor, or the Bankrupt, or any other Party to the Petition, to be or not to be examined, and if it requires the Jury to have before them what the Court had before it, and to elucidate that, it is usual to direct the Parties to be examined. The Reference is to the Master in this Case, and the Principle is this; the Master is to look into the Matters before the Court, the Statement of which the Court deems imperfect, to hear the Evidence submitted to him, and to tell the Court the Result; and, I think, that an Affidavit filed in the Petition, and which might have been read before me, may be admitted before the Master.

1811.
6th *Feb.*

Ex parte WOOD.—In the Matter of WOOD.

The Surrender of the Bankrupt to the Commissioners at a private Meeting entitles him to his Protection from Arrest, until he has passed his last Examination.

IN this Case a Commission had issued against the Bankrupt, on the 22d *December*, 1810, and a Summons was served upon him to surrender forthwith, and on the 19th and 21st *January*, and 16th *February*, 1811, at the *George* Inn, at *Manchester*; he surrendered to the Commissioners at a private Meeting, the Day after the Summons, and a Memorandum of his Surrender was indorsed on the Summons. On the 6th *January*, he was arrested for £980, and carried to the Castle of *Lancaster*, although he shewed to the Officer his Summons to surrender, and the Memorandum thereon. The Petition prayed that he should be discharged at the Costs of the Officer.

Mr. *Leach* had, on a former Day, obtained the Order.

Mr.

1811.

Ex parte WOOD.—In the Matter of WOOD.

Mr. *Richards*, this Day appeared for the Officer, upon an Affidavit stating, that he had erred through Mistake; that the Surrender having been at a private Meeting of the Commissioners, and before the Time advertised in the *Gazette;* Doubts were entertained of the Legality of the Arrest; that he (the Officer) stated them to the Attorney who employed him, and it was resolved to take Opinion of Counsel, and the Bankrupt was brought back to *Manchester,* and though not discharged was set at liberty; that he took the Opinion of Mr. *Cross,* who thought the Protection a good one, but as the Point was doubtful recommended another Opinion to be taken; Mr. *Dampier* was accordingly consulted, who thought the Arrest not justifiable. The Officer not knowing how to act, and his Employers threatening to sue the Sheriff for an Escape, he took back the Bankrupt to the Castle. It was therefore submitted, that under these Circumstances the Officer ought not to be charged with the Costs.

The Lord CHANCELLOR,

Observed that from the Analogies of the Cases, and by the Spirit, though not by the Terms of the Act *(a)*, the Bankrupt was entitled to the Order which had been made. In every Case of Privilege, and more particularly in that of a Bankrupt, Parties guilty of a Violation of it must abide by the Consequences. He instanced a Case of the Arrest of a Dowager Peeress, a few Days before, when on an Application made to the House of Lords, although it appeared that the Solicitor, who was a most respectable Man, had erred from Motives very excusable, yet he was held answerable for the Breach of Privilege; his Lordship concluded by saying, that the Bankrupt must, at the Costs

(a) 5 Geo. 2. c. 30.

of

1811.

Ex parte WOOD.—In the Matter of WOOD.

of the Officer, be put in the Situation he was in before the Arrest *(a)*.

(a) It is usual for the Bankrupt to surrender himself at the first Meeting, for the Sake of being protected; but whether if he surrenders at the private Meeting he will be protected from that Time until he has passed his Examination, is a Matter of some Doubt. 2 *Cooke's* B. L. 21.—And *Vide* 5 *Geo.* 2. c. 30. sect. 1 and 5.

Feb.

Ex parte BOWDLER.

Unless there be a Competition for a Town or a Country Commission, the Court will not interfere.

THIS Petition prayed that a Commission of Bankrupt might be executed at *Manchester* and not in Town; there was an Affidavit by *Bowdler*, who was the petitioning Creditor, that he and his Partner, and almost all the Creditors of the Bankrupt lived at *Manchester*.

Mr. *Wear*, in support of the Petition.

The Lord CHANCELLOR.

Where there has been a Competition for a Town Commission, or a Country Commission, it has been usual to apply to the Court, and the Court has directed it to issue as most convenient for the general Benefit of the Creditors, If there is such a Competition here, Notice of this Application should have been given to the opposite Party; if there is no such Competition, what have you to do here? You have merely to apply at the Office for a Country Commission, and give in Commissioners Names.

Application refused.

Ex

1811.

February.

Ex parte FOSTER.

There not being a sufficient Act of Bankruptcy appearing on the Proceedings, the *Lord Chancellor* ordered a farther Affidavit to be laid before him, and it not being satisfactory superseded the Commission with Costs, having previously suspended the Insertion of the Advertisement in the *Gazette*.

THE Object of this Petition was to supersede a Commission which had been taken out against the Petitioner on the 23d *January* 1811, to have an Assignment of the Bond, and in the mean Time to suspend the Insertion of the Advertisement in the *Gazette*.

The Grounds of the Application were, that there had been no Act of Bankruptcy, that the Petitioner had more than sufficient to pay all his Debts, that there was nothing due to the petitioning Creditor, and that the Petitioner had offered to pay whatever might be due to him.

The petitioning Creditor's Debt was claimed on the Balance of an unliquidated running Account.

Sir *Samuel Romilly*, and Mr. *Montague*, in support of the Petition.

Mr. *Hart*, and Mr. *Heald*, *contra*.

The Lord CHANCELLOR.

It appeared to me from the first, that nothing could be more delicate than the Question, whether I ought to interfere between the Adjudication of the Commissioners, and the Insertion of the Advertisement in the *Gazette*; and if it were clear on the Proceedings that there had been an Act of Bankruptcy, I should hesitate a very long while before I should so interpose my Authority: but on reading these Proceedings it did appear to me that there was nothing to support the Decision of the Commissioners, and whatever might be the Reason of Lord *Rosslyn*'s

1811.
Ex parte FOSTER.

Rule (*a*); it is extremely useful to record Evidence which shall in all Stages be sufficient to support the Commission: in this Case, as to the Trading there is no Doubt, and the Affidavit of the Debt is in the usual Form, and if the Act of Bankruptcy had been recent, I should not have considered myself called upon to examine it with the same Accuracy, as to whether it was antecedent or not to the Debt, though I think that should be made to appear on the Proceedings. The Quantity of Debt was fluctuating, and the supposed Act of Bankruptcy as old as *March* 1810; and Nine or Ten Months before the Commission. In *March* 1810, Directions were given to deny him to a Creditor, but no Time is stated when those Directions were obeyed; it appears to me not an undue Suspicion to say there was a Doubt as to the Time, and it is the more extraordinary because the Deponent mentions an Individual to whom the Denial was made, and by whom we might see if it was so connected with the Direction as to constitute the Act (*b*). The Deponent represents that he made the Denial, and that he stated his having done so to Mr. *Foster* who afterwards approved of it, and that is Evidence to a Jury. But if the Denial is not connected with the Direction, the subsequent Approbation of it amounts to nothing; or if after such Denial having been given he subsequently met those Persons in his common Intercourse of Business, and in the World, it amounts to nothing. In strictness there being no Act of Bankruptcy on the Proceedings, I ought to supersede this Commission, and if the Commission is to go on, whatever is stated to me on Affidavit, must be on the Proceed-

(*a*) *Vide* 2 *Cooke*, 293. The General Order of 26th *November*, 1798, requiring the Attendance of the petitioning Creditor at the opening of the Commission, and the Entry of the Depositions on the Proceedings.

(*b*) *Dudley* v. *Vaughan*, 1 *Camp.* Rep. 271, and the Cases collected in *Cooke*'s B. L. 79.

ings:

ings. It is impossible I can let this Commission go on unless they lay before me an Affidavit of the Act of Bankruptcy.

1811.
Ex parte FOSTER.

The Insertion of the Advertisement in the *Gazette* was ordered to be suspended.

An Affidavit was afterwards filed of the Act of Bankruptcy, which his Lordship thinking unsatisfactory, the Commission was ordered to be superseded, at the Cost of the petitioning Creditor.

Ex parte DICK.

1811,
March 15.

When a Bankrupt has in an Action against his Assignees, established that there was no Act of Bankruptcy, the Court will not, unless under very special Circumstances, delay superseding the Commission, till after another Trial. It is not a sufficient Ground, that the Assignees have Evidence to support the Commission, which they were prevented from producing by Surprise.

In an Action brought by the Bankrupt against his Assignees, they must, independently of the Notice under Sir *Samuel Romilly*'s Act, be presumed to know that the Bankruptcy is disputed, and ought to be provided with Evidence to support it.

THE Bankrupt had presented a Petition to supersede a Commission which had issued against him in *November* last, and having also brought an Action of Trover against his Assignees, his Petition had been ordered to stand over till after the Trial of that Action. The Action had been tried at the adjourned Sittings after last *Hilary* Term, and he had obtained a Verdict; and he had now filed a supplementary Petition, stating that Fact, and praying that his Commission might be superseded and the Bond assigned.

Sir *Samuel Romilly*, and Mr. *Montague*, for the Petition.

1811.

Ex parte Dick.

Mr. *Hart*, and Mr. *Cooke* for the Assignees, contended that the Question had not been properly met on the Trial, that they had been taken by Surprise, and they therefore requested another Trial, in which they had no Doubt of establishing the Bankruptcy. They relied on the Affidavit of the Solicitor to the Commission, that in consequence of the Lateness of the Notice delivered under Sir *Samuel Romilly's* Act (*a*), they had not Time to prepare all the Evidence. That the only Witness examined to the Act of Bankruptcy was one *Kneller*, who spoke only to his having been denied; but there where other Witnesses who could have proved the following Facts, and of which they now made Affidavits on the present Petition. They had the Affidavit of a Person in company with *Kneller*, who, at the Time of *Kneller's* being denied, saw *Dick* at the Window, and it is sworn he must have heard the Denial. These were Facts for a Jury, and whence they would presume that the Denial was by his Authority, and that he was keeping House for the Purpose of delaying his Creditors: and although all Exertion might not have been used, yet if the Court had no Doubt that there was an actual Act of Bankruptcy, it would not supersede the Commission: besides *Dick*, when he had Liberty to discontinue his Action, and give Notice under Sir *Samuel Romilly's* Act, was put on the Terms of withdrawing his Petition.

(*a*) 49 *Geo.* 3. c. 121. s. 10. *Dick* had been allowed under a Judge's Order, after the Defendants had pleaded to give the Notice required by this Act, undertaking not to proceed in his Petition in Bankruptcy. As to allowing a Defendant to withdraw his Plea, and plead it again with the Notice under this Act. *Vide Willock* v. *Smith*, 2 *Camp.* Rep. 184. and that such Notice may be proved by the Defendant in the Beginning of the Cause, and the strict Proof of the Commission thrown on the Plaintiffs, the Proceedings not being a *primâ facie* Case. *Decharme* v. *Lane*, *Ibid.* 324.

Sir

1811.
Ex parte
Dick.

Sir *Samuel Romilly*, in Reply.

The Argument, from the Shortness of the Notice, has no Weight whatever; it is impossible they could be ignorant that the Validity of the Commission was the Point in issue: for what Purpose could a Bankrupt bring an Action against his Assignees, except to try the Bankruptcy. Here was an Action of Trover, and a Petition to supersede a Commission; would your Lordship believe it possible, even if it were sworn, that they must not have known that the Act of Bankrupt, and the Validity of the Commission were to be tried?

The Lord Chancellor.

I am justified in considering this as a Case, in which a Party has been adjudged a Bankrupt, without sufficient Grounds for the Adjudication. An Action of Trover has been brought in which that Point has been established, and they now come here upon the Ground of Surprise, to have another Trial. It is impossible that in the Action brought by the Bankrupt against the Assignees, they could believe that any Thing was in issue but the Act of Bankruptcy, or that the Notice given them, under Sir *Samuel Romilly's* Act, could be the First Notice they had of the Object of the Suit. It is not a Situation where they are to be surprised by any Case to be made on their Part; they must have had Witnesses to the Proceedings under the Commission. Surely we are dealing a little hard with the Bankrupt if when there is not satisfactory Proof of the Bankruptcy we do not supersede his Commission: if when the Bankrupt has brought his Action, and established that Point, those who are to support that Commission, and ought to be prepared with their Proofs, are to come here and say, because they have not offered satisfactory Proofs to a Jury, they are entitled to another Trial.

1811.
Ex parte
DICK.

But then, it has been said, that he was put under Terms of withdrawing his Petition; I would not hold a Man bound by an Order of that Kind, precluding him from applying to the Great Seal, on a Subject within its particular Jurisdiction; but I do not take that to be the Meaning of the Order, I think it merely meant that you shall not proceed to try by Petition, that which you are about to try in your Action at Law. I think it high Time to say that Commissions are taken out upon very slight Grounds, and that when the Bankrupt has defeated such Commission by an Action, it is too much to expect of this Court that he shall be compelled to try that Action over again. I do not say there may not be Circumstances in which the Court would so interfere; but in the present Case there are none. If the Parties choose to take out another Commission that is in their Discretion; but the present must be superseded with Costs. I shall not assign the Bond.

Mr. *Hart* urged that the Petitioners were only entitled to the Costs of One Petition.

The Lord CHANCELLOR.

They must have the Costs of both.

Ex

1811.

Ex parte LAVENDER. *February* 21.

LAVENDER and *Judd* were Partners; in the Month of *August* 1810, a separate Commission issued against *Lavender*, upon a Debt due from the Partnership, to which he, by the Advice of his Solicitor, did not surrender. A joint Commission was then taken out against him and *Judd*; to this he surrendered, and was, on the Day of his last Examination, taken into Custody for not having surrendered to the former Commission, carried before a Magistrate and committed for Trial. The Object of this Petition was that the separate Commission might be superseded, or that if his Lordship should not think fit to supersede it, that the Petitioner might be at liberty to attend the Commissioners, and have the Reason of his having omitted to surrender indorsed on the Proceedings.

The *Lord Chancellor* will supersede a Commission to which the Bankrupt has been prevented from surrendering by Ignorance or Mistake. In this Case a separate Commission issued against one of two Partners, to which the Bankrupt did not surrender; a joint Commission was afterwards taken out, to which he had surrendered; and had afterwards been committed to take his Trial for not appearing to the First.

It had stood over from a former Day in order that an Affidavit of the Solicitor might be produced.

This Affidavit was now read, and it stated, that he, the Solicitor, verily believed that the separate Commission had been illegally obtained, and could not be supported, on the Ground that it must be a legal separate Debt to sustain a legal separate Commission. That he verily believed the Bankrupt was always ready to surrender, but that he advised him not to surrender; and that he remained concealed at *Bristol*, with the Knowledge of the Deponent and the petitioning Creditors under the joint Commission, till the joint Commission issued *(a)*.

(a) The Deponent was the Solicitor to the joint Commission.

1811.

Ex parte LAVENDER.

There was an Affidavit of the petitioning Creditors to the same Effect.

Sir *Samuel Romilly*, and Mr. *Hall*, in support of the Petition, submitted that there was no Intention to defraud; but merely an Error through Ignorance, and cited *Ex parte Wood*, 1 *Atk.* 222 (*a*).

Mr. *Parker*, *contra*, contended, that under the Circumstances the separate Commission ought not to be superseded; that the Assignees were willing to accept the Surrender if his Lordship would appoint a Day, and not to proceed in the Prosecution.

Sir *Samuel Romilly*.

It is impossible, this Prosecution out of the Case, but that the separate Commission must be superseded. There is a clear Act of Bankruptcy committed by *Judd*.

The Lord CHANCELLOR.

If it be true, that through Ignorance, and the Advice of his Attorney, and acting under the Influence of that

(*a*) "Lord *Macclesfield* "did in more Instances than "one, supersede a Commis- "sion of Bankruptcy, when "the Bankrupt had not sur- "rendered himself within the "Forty-two Days, if there "did not appear to be any "Intention in the Bankrupt "of defrauding his Creditors "by not appearing within the Time appointed, and "when his Absence proceed- "ed rather from an Ignorance "of the Consequence or Ac- "cident; and his Lordship "took this Method to pre- "vent a Prosecution." *Per* Lord *Hardwicke*, in *Ex parte Wood*, 1 *Atk.* 222. *Cooke's* B. L. 436. *Vide Ex parte Jones*, 4 *Ves.* jun. 409.

Advice,

Advice, he did not surrender, although it is a very hard Case to prosecute in, and one in which the Crown would be induced to pardon, yet these Circumstances will not protect him. Supersede the separate Commission; I am satisfied by that Case cited *(a)*, that the Court has done it.

1811.
Ex parte
LAVENDER.

The Assignees, under the separate Commission, to have their Costs.

(a) Ex parte Wood.

Ex parte POMEROY.—In the Matter of ROWLANDSON.

1811, *March.*

THIS was a Petition under Sir *Samuel Romilly's* Act, 49 *Geo.* 3. c. 121. sect. 19. praying that the Assignees of the Bankrupt might either accept the Benefit of an Agreement for a Lease, or deliver it up, together with the Possession of the Premises to the Petitioner, who was the Landlord, and that he might be at liberty to prove against the Estate for Rent, Fixtures, &c.

Mr. *Cooke*, in support of the Petition, stated the Difficulty to be, that in this Matter there were two several Commissions, and distinct Assignees, and Issues had been directed which were still undecided. The Assignees did not appear.

The Lord CHANCELLOR.

Take an Order on the Assignees, under each Commission, to make an Election to depend on the Result.

Ex

1811.

LINCOLN'S INN HALL, *April* 8.

Ex parte HARBIN.—In the Matter of HOOPER.

The Evasion of Lord *Rosslyn's* Order requiring the Insertion of the Names of Two Barristers in a Country Commission, is a Ground for superseding it.

A Barrister who cannot attend for the Twenty Shillings allowed by 5 *Geo.* 2. c. 30. s. 42, is not within the Order.

THE Bankrupt and the petitioning Creditor resided at *Ringwood* in *Hampshire*. In last *Michaelmas* Term an Application had been made to the *Lord Chancellor* for a Commission to be directed to *Salisbury*, and that the General Order of Lord *Rosslyn (a)*, requiring the Names of Two Barristers to be inserted in every Country Commission might be dispensed with, on the Ground that there was no practising Barrister within Thirty Miles of *Salisbury*. The *Lord Chancellor* had accordingly made the Order. The Commission issued to *Salisbury*, under which *Hooper* had been declared a Bankrupt, and Assignees had been chosen.

The present Application was, that the Commission might be superseded at the Expence of the petitioning Creditors, as having issued on a Misrepresentation. The Bankrupt and the said petitioning Creditor well knowing, at the Time the former Application was made, that there were Two practising Barristers residing near *Ringwood*, one of whom was in the frequent Habit of acting in Commissions at *Ringwood*, and was at that Time so acting.

Mr. *Richards*, and Mr. *Montague*, for the Petition.

Sir *Samuel Romilly*, *contra*, insisted that the Barristers in question were not within the Order, one lived Twenty-five Miles from *Ringwood*, and could not attend for the Twenty Shillings allowed by the Act *(b)*, there were Affidavits of his having received Seven Guineas and a Half for his Expences in attending.

(a) 2 *Cooke's* B. L. 293.

(b) Statute 5 *Geo.* 2. c. 30. s. 42.

The

1811.

Ex parte HARBIN.—In the Matter of HOOPER.

The Lord CHANCELLOR.

In this Petition there are Two Points; the first, as to the Commission having issued to *Salisbury;* the second, as to its being directed to Attornies instead of to Two Barristers, as required by Lord *Rosslyn*'s Order *(a)*. I have looked through the Proof of the Debts on the Proceedings, and do not think the first Objection is important *(b)*; in regard to the second, as long as the Order stands, I will, in every Case of fair Application, supersede the Commission, if there has been an Attempt to evade it; and if this Commission had been carried to *Salisbury* to get it out of the Reach of Barristers from a Place where it might with as much, I will not say more, Propriety have been executed, I would not require other Evidence of Evasion, and would supersede it at the Costs of the Party who took it out, if the Application was made in proper Time, and before Expence had been incurred by the Proceedings being suffered to run on. As to what has been said respecting the Allowance to cover the travelling Expences of a Barrister attending to execute Commissions, on considering the Act *(c)*, and what has been done upon the Taxation of Bills of Costs, I do not think that that Plan of paying for Expences has ever received the Sanction of the Court, and, in Cases where a Barrister could not attend without that Expence, I must consider him as a Barrister who would not attend, and should feel it extremely difficult to say that he was within Lord *Rosslyn*'s Order; if therefore the Attendance of Barristers could not be procured at *Ringwood* but at that Expence, and the Commission is to be carried on by Attornies in *Salisbury* at Twenty Shillings, there is no Ground to supersede it.

(a) 2 *Cooke* 293.

(b) Several of the Creditors residing at or near *Salisbury*.

(c) 5 *Geo.* 2. c. 30. s. 42.

Ex

1811.

April 5.

Ex parte BLACK.—In the Matter of SANDEN.

THIS was an Application to stay the Bankrupt's Certificate, and one of the Grounds relied on was, that *Sanden* had before been a Bankrupt, and the Commissioners had not, in conformity to Lord *Apsley*'s Order *(a)*, certified that Fact.

The Objection was over-ruled.

(a) 2 *Cooke* B. L. 282.

Ex parte MAGENNIS.

THIS was a Petition for a Supersedeas. The Bankrupt was in Custody, under a Commitment by the Commissioners for Prevarication; it was objected, that he was therefore not entitled to make the present Application.

The Lord CHANCELLOR over-ruled the Objection.

Ex

1811.

Ex parte EMLY.—In the Matter of LYE. *April 6.*

GEORGE Lye, of *Warminster*, who for several Years had been the Proprietor of the Waggons travelling between *Bristol* and *Salisbury*, in 1803 purchased the *Bath* and *London* Waggon-Business, and removed to *Bath*, where he conducted that Branch of the Trade, leaving his Son *Edmund Lee Lye* at *Warminster* in the Management of the other. About that Time the Father and Son entered into Partnership, the Father to have Two-thirds, and the Son One-third; and as the Profits of the *Bath* Business bore that Proportion to the *Salisbury*, the Father solely managed the former, and the Son the latter. They had a Clerk in *London*, to whom Remittances were indiscriminately made, both on Account of the *Salisbury* and the *Bath* Concern, and the whole of the Profits was carried into one common Stock, and one common Cash Account was kept, from which the Father and Son respectively drew as they had Occasion. The Son before the Partnership, while he acted as the Servant of his Father, and for Two or Three Years after it, had been in the Habit of drawing Bills, in his separate Name, upon the Clerk in *London*, and discounting them for the Use, as it was alleged, of the Partnership; and latterly he was accustomed to draw them sometimes in his own Name alone, and sometimes in the joint Name of himself and his Father, but the Produce in either Case was applied to Partnership Purposes. Both the Father and Son had severally made Purchases of Land, and expended Money in Improvements. The Petitioners, who were the Assignees of the Bankers who had discounted Fifty-six of these Bills, Twenty of which had been drawn by the Son

A. the Partner of *B.* carrying on Business at a different Place, draws Bills of Exchange sometimes in the Name of the Firm, and sometimes in his own Name, on the Clerk of the Partnership managing the Business in *London*, and discounts them with Bankers in the Country, on an Application by them that the Bills drawn in the separate Name of *A.* might be considered as a Partnership Debt, as having been applied to Partnership Purposes. The *Lord Chancellor*, expressing an Opinion against the Claim, directed Dividends to be reserved till after an Action at Law.

in

1811.

Ex parte EMLY.

in the Name of the Firm, and Thirty-six in the separate Name of the Son, prayed, that the Estate of the Father and Son might be declared to be one common Fund; the Creditors admitted *pari passu (a)*, or that the Bills drawn by the Son alone might be considered as joint Debts.

The Affidavit of *George Lye*, the Father, stated his Ignorance of such Bills having been circulated till just before the Bankruptcy; that when he heard of it, he remonstrated with his Son on the Subject, and, if the Bankruptcy had not intervened, would have dissolved the Partnership. The Banker, who had discounted the Bills, swore, that he did not know the Son, and that he would not have made the Advances to him on his own Credit, and that the Bills had been given to replace others which were drawn in their joint Names.

Mr. *Hart*, Mr. *Leach*, and Mr. *Wray*, in support of the Petition.

The Bills, it must be admitted, are *primâ facie*, and in Form a separate Debt, but they are in Substance a Debt from the Partnership. If Goods be delivered to an individual Member of a Partnership, although he does not disclose that it is for the Partnership, and although the Creditors imagined it to be merely for that Individual, they may prove as against all the Partners *(b)*; and the same prin-

(a) It appearing that the Commissioners had advertised Dividends of the joint and separate Estate, this Part of the Petition was abandoned.

(b) If one Partner, meaning to cheat the other, purchases Goods used in the Partnership Business, and instantly pawns them to raise Money for his own Use, the other Partner is liable, although there may have been no previous Dealings between the Parties, unless the Seller is guilty of Collusion. *Bond* v. *Gibson*, 1 *Camp.* Rep. 185. *Willet* v. *Chambers*, *Coup.* Rep. 814. *Wats. Part.* 2 Edit. 175. 180.

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Ex parte EMLY.

ciple must apply to Money. *George Lye* knew that the Advances were made on the Credit of the Partnership, and that *Edmund Lee Lye* was drawing Bills in his separate Name. The Clerk in *London*, was his immediate Servant, and informed him of the great Increase of Bills, he must have known, or at least must be presumed to have known, the State of the *London* Accounts. The Persons who advanced the Money, advanced it on the Credit of the Partnership; this is enough, if *George Lye* did not know it, but we fix him with Notice.

Sir *Samuel Romilly*, and Mr. *Daniel, contra.*

The second Part of their Application is grounded on their first, and that being given up, there is nothing to entitle them to receive Dividends with the joint Creditors; they kept no Account with *Lye* and Sons; they were mere Country Bankers, discounting for whoever applied to them with Bills they approved of.

The Lord CHANCELLOR.

That is a very material Point. If these Bankers had kept an Account with *Lye* and Son, and all the Papers, both joint and separate, had been kept in one Account, it would have presented a very different Case.

Argument.

The single Question is, whether Bankers can follow the Money specifically, or do more than resort to the Names on their Bills? how do they prove that the Money was advanced to the Use of the Trade? they say it was carried to a common Fund, but that common Fund constituted the Partnership, as well as their private Fund; they have both made Purchases as separate Property, and laid out Money in Improvements; how can this Money be traced? it

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it may have been advanced for the separate Estate of the Son, unless they can shew it was advanced for the joint Estate their Application must fail. . . .

The Lord CHANCELLOR.

In this Petition there are two Objects; the first is, that all the Property of the Two Bankrupts may be blended together, and the joint and separate Creditors paid *pari passu*, as if they were all Creditors of the same Class, on the Ground that the joint Property cannot be distinguished from the separate; and the second, that the present Petitioners may be considered as joint Creditors. The Rule *(a)*, as to joint and separate Estates, whatever might have been said against its original Adoption, and much might have been said, is too well settled to be now shaken; it has been settled to that Extent, that when there have been joint Creditors to the Amount of many Thousand Pounds, and separate Creditors to a very trifling Amount, the latter have been allowed to take Twenty Shillings in the Pound, and to sweep away the Estate from the joint Creditors. Partners without Doubt may lend to one another; if one Partner were to take £50,000 out of the Firm, and buy real Estates with it, although it would be a very hard Case that the joint Fund should be thus abstracted from the joint Creditors, yet it was so done by Contract, and not by Fraud, the Estate so purchased would go to the separate Creditors *(b)*. Beyond all Question in this Case there is separate Property; when the Petition admits there is joint Property, and states that the Bankrupts have purchased real Estates, it has proved there are distinct Estates, and as to the first Part of the Application, carries with it its own Answer. There may indeed be Property of a

(a) Ex parte Tait, 16 *Ves.* 194, and the Cases referred to in the Note there, *et Ante*, Page 21.

(b) Vide Smith v. *Smith*, 5 *Ves.* jun. 189. *ex parte* the Assignees of *Lodge* v. *Fendal*, 1 *Ves.* jun. 166.

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middle Character, but the Property will not, on that account, be made joint or separate, because either the separate or the joint Creditors are entitled to say, rather than that shall be the Case, that they will give up the doubtful Property; it is impossible therefore that that Part of the Petition, which prays that the Two Estates may be considered as a common Fund, can be maintained, but if there is any Property of a doubtful Nature that may be made the Subject of a special Application. The last Part of the Case is this. The *Warminster* and the *Bath* Concern were one, but the *Bath* Business being worth about as much again as the *Warminster*, *George Lye* took the former to himself, giving up the latter to his Son; but that Arrangement of the Profits will not make them the less Partners; there is not, with either of the Banks, an Account with this Partnership of Bills brought in, and Money paid; in some Instances *Lye*, the Son, sent Bills drawn by himself alone on Persons who, though Men of Straw, the Law considers, as to the Form of the Contract, and the Mode of enforcing it, as perfectly substantial; and at other Times Bills having the Name of himself and his Father. The Law, in regard to Goods, is as stated by Mr. *Leach*; but it is a different Question where Goods are sold to *A. B.* and *C. D.* and it is Part of the Contract that *A. B.* shall give Bills of Exchange, whether those Bills are not a Payment; except the Case of antecedent Debts. It is not enough to prove that Money borrowed by an Individual goes into the Partnership Estate to make the Partners liable (*a*). Is there sufficient here to raise an *Assumpsit* for Money paid and advanced to the Use of the Partnership? My Opinion is, that if Persons will take Paper in this Way they must abide by it. The Petitioners may take an Order on the Commissioners to reserve a Dividend, bringing an Action forthwith against the Bankrupts, who are not to set up the Bankruptcy.

(*a*) *Vide* 1 *Mont. Dig.* B. L. 618, *& seq.*

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LINCOLN'S INN HALL.
April 11.

Ex parte STRACEY.

A Creditor, who is the Executor of a Creditor, is only entitled to sign the Certificate once.

An Objection to the Proof of a Debt, in point of Form, is not sustainable against the Certificate.

THIS was a Petition against the Allowance of the Bankrupt's Certificate, and that the Proof of certain Debts might be expunged, whereby the Amount in Number and Value, requisite to the Validity of the Certificate, would be Deficient. The Objections were, that one *Mary Cattle* had signed the Certificate Three Times, once in her own Right, secondly, as the Executrix of *William Henry Cattle*, deceased, thirdly, as the Executrix of *George Cattle*, to whose Estates respectively the Bankrupt was indebted; that one *Goslin* had proved a Debt due to himself and his Partner as a several Debt; and that *Philips*, who resided in the Country, being in Town, (but about to return to the Country,) had made an Affidavit of his Debt before a Master in Chancery, which the Commissioners had admitted.

Mr. *Richards*, in support of the Petition.

Mr. *Heald*, for the Bankrupt.

The Lord CHANCELLOR

Enquired of Mr. *Cooke* what was the Practice in regard to the signing of the Certificate by a Creditor who was the Executor of a Creditor.

Mr. *Cooke*.

In *Ex parte Saumarez*, 1 *Atkyns* 85 *(a)*, Lord *Hardwicke* decided, that he was only entitled to sign once, being both Debts to him in point of Law.

(a) Vide 1 *Cooke's* B. L. 85, and *Powel* v. *Evans*, 5 *Ves.* 839, as to Executors in Trust.

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Ex parte STRACEY.

The Lord CHANCELLOR.

I think so; I should not have listened to the Objection to *Goslin's* Proof as against the Certificate. The *Debt* is not impeached, and setting himself in Right, in point of Form, he is entitled to prove for himself and his Partner; the same Observation will apply to *Philips's* Debt. I will not stay this Certificate, but there must be no Costs for the Reasons already stated *(a)*.

(a) It is a *general* Rule that when a Petition to stay a Certificate is dismissed, it is dismissed with Costs; many Petitions of this Nature were, during these Sittings, dismissed *without Costs*, on the Ground that, although the Bankrupt was entitled to his Certificate, there were Circumstances in his Conduct which precluded all Claim to the Indulgence of the Court. *Ex parte Black*, *Ex parte Nichols*, *&c. Lincoln's Inn Hall*, *April* 1811. So also on several Petitions by Creditors, that they might be at liberty to go in and prove, and the Certificate in the mean Time be stayed. *The Lord Chancellor*, although he gave them Liberty to go in and prove, yet stated that he would not send back the Certificate unless a satisfactory Reason was given why they had not gone in before. *Ex parte Dyson*, &c. *Lincoln's Inn Hall*, *April* 1811. That the Bankrupt's Accounts are in a slovenly State, is no Ground for staying the Certificate, unless he has refused his Assistance to explain or elucidate them. *Ex parte Rawson*, *Lincoln's Inn Hall*, *April* 1811. The Commissioners have no Power under Lord *Rosslyn's* Order, 8th *March* 1794 *(a)*, to order the Sale of an equitable Mortgage. *Ex parte Swaine*, in the Matter of *Rawson*. *Lincoln's Inn Hall*, *April* 1811.

The Bankrupt's agreeing to an Act of Bankruptcy, unless he concerts it, is no Objection to the Commission. *Ex parte Oliver*, in the Matter of *Russel*. *Lincoln's Inn Hall*, *April* 1811.

(a) 2 *Cooke's* B. L. 290, and *Vide Ex parte Payler*, 16 *Ves.* jun. 434.

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In the above Petition Mr. *Heald* was about to read the Examination of the Bankrupt before the Commissioners. Mr. *Richards* objected, that they were not Evidence from the Want of Notice. The *Lord Chancellor* ruled, that there must be Notice.

Ex parte MANNERS.—In the Matter of VOSS.

THE Petitioners were Bankers at *Lincoln*, and the Holders (for a valuable Consideration, and without Notice) of Two Bills of Exchange, purporting to be drawn, one at *Haerlem*, and the other at *Amsterdam*, on the Bankrupt, and accepted by him. Proof had been refused by the Commissioners, the Bankrupt on his Examination having stated, that both the Bills had been drawn in his own Counting-house in *London*; they were without Stamps. The Object of the Petition was, that they might be proved, and the Certificate in the mean Time stayed.

Sir *Samuel Romilly*, in support of the Petition, contended, that the Fact of the Bills having been drawn in *London*, rested solely on the Testimony of the Bankrupt, who at Law was an incompetent Witness to increase the Estate, and here was not credible; he stated the Inconvenience that would arise if Parties were permitted to circulate Bills of this Kind without incurring any Obligation on them.

Mr. *Hart*, and Mr. *G. Wilson*, appeared for the Bankrupt.

The Assignees did not appear. The Petition was dismissed.

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April 1811.

Ex parte BROOME.—In the Matter of HOOPER.

A induced by the fraudulent Representations of *B* as to the Profits of his Business, gives him a certain Sum of Money for a Share of it; on the Discovery of the Fraud, *A* files a Bill in Equity for an Account, to have the Partnership declared void, and for a Receiver.

The Receiver was ordered: *B* becomes Bankrupt; Petition by *A.* to be admitted to prove under his Commission refused, with Liberty to make a Claim.

Although *A.* as against *B*, might have an Equity to say he never was a Partner, it would be difficult to say so as against third Persons.

IN the Year 1809, the Bankrupt, an Attorney at *Ringwood* in *Hampshire*, in Consideration of a Premium took the Petitioner into Partnership for Fourteen Years, with Liberty to retire at the End of the first Seven upon certain Terms; and he guarantied that the Petitioner's Share of the Profits should, for the first Seven Years, Amount to £400 *per Annum*. The Petitioner paid the Bankrupt, in Part of the Premium for such Partnership and Guarantee, £1000 on the Day the Partnership commenced, and entered into a Contract for Payment of the Remainder at a subsequent Day. Shortly after the Partnership began, the Petitioner discovered that the Bankrupt was in the Habit of drawing and accepting Accommodation Bills; that he was greatly in Debt and Insolvent, and that the Profits of his Business, and the Extent of his Property and Connection had been misrepresented by him as an Inducement to the Petitioner to become a Partner. Other Matters were stated, tending to shew that the Bankrupt had taken the Petitioner into Partnership merely to retrieve his Affairs, which were desperate.

Shortly after the Commencement of the Partnership the Petitioner filed a Bill for the Purpose of having it declared void, on the Grounds of Fraud and Imposition arising from the Circumstances before mentioned, and praying also a Receiver of the Partnership Property; the Receiver had been ordered upon Motion in the Suit before the Bankruptcy, which took place about a Year after the Partnership began.

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The Petitioner had applied to prove the Premium paid by him on entering into the Partnership, and the Commissioners holding that the Proof was inadmissible while the Suit in *Chancery* was pending, he now prayed to be admitted to prove, to vote in the Choice of Assignees, and to receive a Dividend with the other Creditors.

The Allegations of the Petition were supported by Affidavits of the Petitioner, and by those of Persons who spoke particularly to the Bankrupt's insolvency at the Time the Partnership commenced.

Mr. *Richards*, Mr. *Montagu*, and Mr. *Wray*, in support of the Petition, contended, that the Premium having been paid as a Consideration for a Partnership for a certain Term, and with a Share of Profit guarantied to amount to a certain Sum, and the Bankrupt having been at the Time insolvent, or at all Events the Bankruptcy having put an End to the Contract; it was Money paid for a Consideration which had failed, and was therefore a Debt for which an Action would lie, and which might be proved like any other separate Debt; that it ought not to be considered as Matter of Account, or as a Transaction between the Partners as such, but as antecedent to the Commencement of the Partnership, or upon the Principle that the Partnership had no Existence.

Sir *Samuel Romilly*, for the Assignees, contended, that the Partnership having commenced, it was not a Consideration which could be said to have failed; that the Petitioner and the Bankrupt had been in fact Partners, and the Claim altogether a Matter of Account between them as such, and therefore the Proof could not be admitted in Competition with the other Creditors.

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Expressed himself at first inclined to grant the Prayer of the Petition, provided the Petitioner would abandon the Suit in Equity, and the Receiver, but took Time to consider; and afterwards (observing that although the Petitioner might have an Equity to be considered as never having been a Partner, yet that it was extremely difficult to say that as to third Persons he was not a Partner) made an Order, that the Petitioner should be at Liberty to enter a Claim only for the Amount of his Demand, but not to prove with the separate Creditors.

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It is discretionary in the *Lord Chancellor* to postpone the Dividend beyond the Time limited by Stat. 5 *Geo.* II. c. 30. s. 33.: but a Petition by Creditors of surviving Partners that the Dividend might be postponed, until those who were also Creditors of a deceased Partner, and had filed a Bill against his Representatives for an Account of his Assets, and Payment of their Debts, should have gone in under the Decree, was dismissed for want of Equity.

WILLIAM Devaynes, at the Time of his Death on the 29th *November* 1809, was the senior Partner of the Banking-house of *Devaynes, Dawes, Noble, Croft,* and *Barwick*; after his Death the Four last-named Persons, as the surviving Partners, continued the Business as before, without new Books, or making Rests, or coming to any Account with the Representatives of their deceased Partner, whereby Part of the Effects belonging to the Firm of *Devaynes, Dawes, Noble, Croft,* and *Barwick*, came immediately into the Possession of the Four surviving Partners; and Part was from time to time, between his Death and their Bankruptcy, got in and mixed with their own Funds, and other Parts remained outstanding at the Time of their Bankruptcy. On the other Hand, in

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the Course of Business, the surviving Partners had paid off Debts owing by *Devaynes, Dawes, Noble*, and Co. to a large Amount, some in part, some in full, so that at the Time of the Bankruptcy there were, besides the Creditors who never had any Dealings with the House in *Devaynes*'s Life-time, Creditors of the following Description, claiming to prove, under the Commission: 1st. Creditors in respect of Debts owing by *Devaynes, Dawes, Noble*, and Co. at the Death of *Devaynes*, upon which there had not been any Payment, or only Part-Payments, by the surviving Partners: 2d. Creditors, at the Death of *Devaynes*, whose Debts had been increased by Payments made to Dividends, or other Money, received by the surviving Partners, but to whom no Payments had been made by either Firm: 3d. Creditors, when *Devaynes* died, who had continued their Account by drawing out and paying in, so that between the Time of the Death of *Devaynes* and the Bankruptcy, they had drawn from the surviving Partners various Sums, some more, some less, than was due from *Devaynes, Dawes, Noble*, and Co. but yet were Creditors, in regard that their Payments had exceeded their Drafts: 4th. Creditors who, at the Death of *Devaynes*, were Debtors, but by their subsequent Dealings had turned the Balance in their Favor: 5th. Creditors in respect of public Stock or Funds, which stood in the Names of *Devaynes, Dawes, Noble*, and Co. as Trustees, and in respect of India Bonds, Exchequer Bills, &c. specially deposited for safe Custody, but which had been disposed of, and the Money applied to Partnership Purposes, partly in the Life-time of *Devaynes*, and partly since.

The Funds, distributable under the Commission, consisted of specific Assets, which belonged to the Partnership at the Death of *Devaynes*, of subsequently acquired Partnership Effects, and the separate Estates of the Bankrupts.

A Bill

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A Bill had been filed by certain joint Creditors of *Devaynes, Dawes, Noble, Croft*, and *Barwick*, on behalf of themselves, &c. for an Account of the Assets of *Devaynes*, and for a Decree to admit the joint Creditors to have the Benefit of his Assets after his separate Debts were paid; and the Creditors of *Dawes, Noble, Croft*, and *Barwick* were desirous that no Dividend should be made under that Commission until the Decree in that Suit, which was proceeding with all Dispatch, should have been pronounced, and the Creditors of the Firm, at the Death of *Devaynes*, should have gone in under the Decree, and have received Satisfaction out of his Assets. The Petition therefore prayed that the Dividend might be postponed accordingly, and the Money in the mean Time be invested in Exchequer Bills.

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Petition.

Mr. *Richards*, Mr. *Hart*, Mr. *Leach*, Mr. *Martin (a)*, Mr. *Wetherell*, Mr. *Abercrombry*, *contra*, for some of the joint Creditors, and the next of Kin of *Devaynes*.

The Lord CHANCELLOR,

After stating the Petition, proceeded as follows: it is perfectly clear that the Operation of this Petition, if the Creditors have a Right to demand it, will produce a larger

(a) Several contradictory Affidavits were put in as to the State of the Accounts, and the Solvency of the House at the Death of *Devaynes*, the Result of which was, that although, upon the Face of the Accounts, the Balance was in Favor of the Firm, yet as a considerable Proportion of their Credit consisted of bad Debts due from a House at *Liverpool*, they were in fact at that Time insolvent.

Dividend;

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Dividend; and the first Question is, whether I have a Power, supposing there was one Creditor who would not submit to have his Dividend postponed, to grant the Prayer of the Petition. The Act of Parliament (*a*) states a certain Time within which the Dividend must be made; but every one knows that Mercantile Affairs are so complicated, that the Directions of the Statute can be complied with in very few Instances, and it must in those Cases belong to that Authority, which under the Legislature, has the Order and Direction of the Bankrupt's Affairs to appoint the Dividends to be made at such Times as the Interests of the Creditors require. It is impossible so to construe the Act, that if the Assignees neglect to make the Dividend at the Time prescribed, this Court must compel them to do it immediately after. And I am anxious to state it as my Opinion, that it is in the Discretion of the Great Seal, though Lord *Thurlow* thought its Jurisdiction more limited, to postpone the Dividend; but when called on so to do it ought to be satisfied the Parties applying for that Purpose have a Right so to apply, and that it is for the general Benefit of all the Creditors that such Postponement should take place.

The other Point is, whether the Creditors who were so in the Life-time of *Devaynes*, have a separate Demand on his Estate, and are entitled to go in and prove against it. Now, without going through the Class of Cases on this Head, without remarking that if a Man chooses to take the joint Credit of five, his legal Security weakens as

(*a*) By 5 *Geo.* II. c. 30. s. 33. the Dividend is directed to be made after four and within twelve Months. In *Ex parte Grosvenor*, 14 *Ves.* jun. 590, the *Lord Chancellor* says, an Assignee is bound to account satisfactorily, for not having made a Dividend within the Time limited; *viz.* after the Expiration of four Months. *Vide* 49 *Geo.* III. c. 121. s. 4.

his

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his Creditors drop into their Graves, it is clear that under Circumstances regulating and modifying the legal Effect, the Court will constitute that Demand: but it is too much to say that because there is a Doctrine in this Court that the Creditors of the five might under certain Circumstances go in, every such Creditor has a Right to resort to the separate Estate of *Devaynes*, or that the subsequent Dealings of a particular Creditor may not have made it inequitable that he should do so.

The next Point is, whether the Creditors of the four can compel them to go in; and if they can, it is by force of the Equity which the Partners have among themselves, and not in respect of the Claim the Creditors have on the Assets. Now the four surviving Partners might have said to *Devaynes*'s Representatives, if there is any Deficiency we must contribute in the Proportions in which we are respectively answerable; if the Deficiency was £80,000, they might have called on his Representatives in respect of his Liability to contribute his Proportion, they contributing the Remainder; but it is quite impossible they could call on him to contribute more, and if his Estate can be made liable beyond that, it must be by the Will and Pleasure of the Creditors. I cannot see how they are to do this: if *B.* and *C.* are Creditors of *A.*, and *B.* has a Right to resort to two Funds of *A.*, and *C.* but to one; it is the common Equity of the Court, if it can be done without injustice to *A.* to compel *B.* to resort to that Fund which *C.* is debarred from; but I never heard of that being done when there was any Injustice to *A.*, and when they are not common Creditors of the same Debtor. The Representatives of a deceased Partner might say, the surviving Partners must pay the Debt, we are only Sureties, and if we are to pay the Debt, we are entitled to the Benefit of your Claim against them. I do not see my way to comply with this Petition. If a Bill were filed I doubt whether the Creditors

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Creditors would be able to establish the Equity they imagine they have; as the Estate is generally interested in getting rid of this Question, let all the Parties have their Costs out the general Estate.

Petition dismissed.

Easter Term, 1811.
15th *May*.

Ex parte PARR.—In the Matter of LEIGH and ARMSTRONG.

The Deduction of a Security is never made in Bankruptcy except when it is the Property of the Bankrupt.

Separate Creditors are not entitled to vote in the Choice of Assignees under a joint Commission.

THE Petitioners were the Holders for valuable Consideration of certain Bills of Exchange, drawn by Persons at *Demerara*, under the Firm of *Brummel, Heyliger*, and Co. and accepted by *Leigh* and *Armstrong*, the Bankrupts. The Bills having become due, and the Acceptors being unable to take them up, the Petitioners resorted to the Drawers. It being inconvenient for the Drawers to pay, it was agreed between the Petitioners and *Brummel* and *Heyliger*, two of the Partners of the Firm of *Brummel, Heyliger*, and Co. that they should assign to them a Plantation in *South America*, as a Security for the Balance then owing upon the Bills and the Interest, which was accordingly done. A joint Commission of Bankrupt sometime afterwards issued against *Leigh* and *Armstrong*, under which the Petitioners had attended to prove the Amount of the Bills and Interest; but the Commissioners refused to admit their Proof without deducting the Value of the Security.

The Petitioners also stated, that they had attended the Meeting for the Choice of Assignees, and were desirous that one *Thomas Parr*, who had been proposed by another joint Creditor, and voted for by the Majority in value

value of the joint Creditors then present, whose Debts amounted to £10 and upwards, should have been elected Assignee; but three other Persons had been proposed by one of the separate Creditors of *Roger Leigh*, and the Majority in value of the separate Creditors of the said *Roger Leigh*; including one joint Creditor, having voted in their Favor, and the Amount of the Debts of the separate Creditors who voted exceeding the Amount of the Debts of the joint Creditors, who had voted for *Parr*, the three Persons chosen by the separate Creditors had been declared duly elected.

The Petitioners prayed that they might be admitted to prove their Bills of Exchange and the Interest; and that *Thomas Parr* might be declared to have been elected sole Assignee, or a new Election might be made.

There was an Affidavit by the Bankrupts, stating that previous to the Year 1799, they carried on Business at *Liverpool*, under the Firm of *Roger Leigh* and Co. and at *Demerara*, under the Firm of *David Armstrong* and Co.; and in the Year 1799, they took into Partnership with them, at *Demerara*, *Brummel* and *Heyliger*; that the Partnership had been put an End to in 1801; the Accounts had not as yet been settled, and that on the Settlement a considerable Balance would be forthcoming to the Bankrupts; that the Bills in question arose out of the Transactions of that Partnership, and had been drawn by *Brummel*, *Heyliger*, and Co. as composing the Partnership Firm, and accepted in the same Manner by the Bankrupts, without the House of *Leigh* and *Armstrong* having Funds in their Hands for that Purpose.

Mr. *Leach*, in support of the Petition, contended that the giving up a Security only holds where it has been given by the Bankrupt; that as to the second Point, by Stat. 5. Geo.

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Geo. II. only those Creditors could Vote in the Choice of Assignees who were entitled to prove without an Order; that formerly separate Creditors could not prove under a joint Commission, without a special Application in each particular Case; and that, although Lord *Rosslyn* had made a general Order *(a)*, allowing them to prove, that did not bring them within the Meaning of the Statute.

The Lord CHANCELLOR.

The Deduction of a Security is never to be made in Bankruptcy, but when it is the Property of the Bankrupt; it is said that it must be so considered in this Case, as the House in *Demerara* and that in *Liverpool* were Partners; but it is quite familiar that the same Firm may be in one Character Drawers, and in another Acceptors; and the Question whether the Mortgage is the Property of the Four must be met in another Way. Next, as to the Assignees, it is a Rule not to disturb the Choice of them where the Commissioners have honestly exercised their Discretion; but here the Question is, whether they have not been elected by Persons who had no Right: it is a fixed Rule, that joint Creditors cannot interfere in the Choice of Assignees under a separate Commission *(b)*; and the Converse of the Rule holds that separate Creditors cannot vote in the Choice of Assignees under a joint Commission.

The Commissioners must call another Meeting, the Petitioners to prove without deducting their Security, and let there be a new Choice of Assignees.

(a) 8th *March* 1794. 2 *Cooke* B. L. 287.

(b) Ex parte Tait, 16 *Ves.* jun. 193, *in notis.*

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SAXTON and JONES *v.* DAVIS and Others.

Easter Term, 8th *May*, 1811.

To a Bill by a Bankrupt who had taken the Benefit of an Insolvent Debtor's Act, and his Assignees under that Act, against the Assignees under his Commission, and others, stating improper Conduct and Collusion; and that all or most of the Creditors under the Commission were satisfied, and praying an Account, a Demurrer on the Ground that the Mode of proceeding was by Petition in Bankruptcy, was allowed.

THE Bill stated that *Jones*, for many Years previous to the Year 1793, carried on the Business of a Builder, at *Bristol*, and was seised and possessed of considerable Freehold and Leasehold Property there; that he had been engaged in various Dealings with the Defendant *Davis*, who was his Agent and Solicitor, and had been employed by him in various Mortgages and Money Transactions; that an unliquidated Account subsisted between them, upon which it was alleged the Balance was considerably in favour of *Jones*. The Bill stated many Instances of Fraud and improper Conduct, on the Part of *Davis*, and that by reason of them, *Jones* became embarrassed in his Circumstances, and on 17th *April* 1793, a Commission of Bankrupt issued against him, which it was alleged *Davis* sued out and prosecuted, and had the sole and exclusive Management and Direction of. That he caused *Richard George* and *Richard Farman (a)*, particular and intimate Friends of his, to be chosen Assignees: they died, and some Time afterwards *Henry Patu*, of *Bristol*, another Defendant, was, by the Instigation and Influence of *Davis*, chosen Assignee; but no regular Assignment had been made to him. *Jones*, in 1795, took the Benefit of an Insolvent Debtor's Act, and his Estate and Effects were assigned to one *Long*, in Trust for him and all other Creditors. The Bill then alleged that *Long*,

(a) The Bill stated that *Richard Farman* afterwards died, leaving *George* surviving Assignee, and the said *Richard Farman* in his Lifetime duly accounted with *Richard George* for his Acts as Assignee. That *George* had also since died, leaving the Defendant *Bence*, his Executor.

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instead of taking any Measures to bring *Davis* to an Account for his fraudulent Transactions, abetted him in them, and had been an active Party in many of them; and in consequence he had been by Order of His Majesty's Court of *King's Bench*, removed from being the Assignee under the Insolvent Act, and the Plaintiff *Saxton* had been appointed in his Stead. The Bill then stated that no Part of the Effects of *Jones* had been fairly and *bonâ fide* sold under the Commission; but that *Davis* had unduly possessed himself of, and was then in Possession of them, and had never accounted with *Jones:* and that *Jones* and *Saxton*, for the Benefit of themselves, and all other the Creditors of *Jones*, were desirous of coming to an Account with him, and had applied to him, to *Bence* the Executor of the surviving Assignee, and to *Long*, for that Purpose. The Bill charged that the Assignees under the Commission, were chosen entirely by the Means and Influence of *Davis*, and to suit his own Purposes, and that he had fraudulently purchased the Property under the Bankruptcy; and that if the Estates, Property, and Effects of *Jones*, had been fairly and properly sold and disposed of, there would have been a very considerable Surplus, after Payment of all his just Debts.

There was also a Charge that *Davis* had in some Measure satisfied all, or the most Part of *Jones*'s Creditors, and had obtained from them Discharges of their respective Claims; but that he has not paid to them the whole of their respective Demands, but some small Sum in lieu thereof; and there had never been any Dividend under the Commission. There was a special Charge of Collusion between *Long* and *Davis*, and certain Persons who were Trustees for *Jones*'s Wife, and were made Defendants as claiming some Interest; that *Davis* was then the Assignee under the Commission of Bankrupt, and was abetted by the other Defendants.

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The Bill concluded by praying an Account against *Davis*, that he might be decreed to pay to *Sutton* what should be found due; and that *Jones's* Freehold and Leasehold Estates might be sold, and the Money distributed among his fair and *bonâ fide* Creditors, and the Residue paid over to him; that *Bence* might be decreed to pay what should be due from *George's* Estate; and that *Long* might account.

To this Bill there was a Demurrer on two Grounds:—1st. Generally for want of Equity.—2dly. That the Application for Relief ought to have been by Petition in Bankruptcy, and also a Demurrer *ore tenus* for Multifariousness.

Sir *Samuel Romilly*, and Mr. *Bell*, in support of the Demurrer.

In *Benfield* and *Solomon* (a) though a much more favourable Case for the Plaintiff than the present, the Demurrer was allowed; as the Bankrupt can have full Relief by Petition, he ought not to resort to the more dilatory Proceeding by Bill: the Court directs a Bill in all Cases where it is necessary, not leaving it in the Option of Parties to adopt that Mode as they think fit; the Inconvenience would be very great if it did; and there would be an End of the Jurisdiction in Bankruptcy: *Clarke* and *Capron*. 2 *Ves.* 666. In Cases in which Creditors have sued the Executor and the Debtor to the Estate, as in *Utterson* and *Mair*, 4 *Bro.* Rep. 270 (b), *Elmslie* and *Macaulay* (c), *Troughton* and *Binckes* (d), the Court has required a strong Case of Collusion, and yet there was in those Cases no other Mode of Proceeding but by Bill:

(a) 9 *Ves.* jun. 77.
(b) 2 *Ves.* jun. 95.
(c) 3 *Bro. Rep.* 629.
(d) 6 *Ves.* jun. 573.

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here there is a direct Mode by Petition, and supposing there was no Mode of getting Relief but by Bill, would it not be better to have a preliminary Investigation in Bankruptcy?

Mr. *Leach*, and Mr. *Peacock*, in support of the Bill contended, that it could not be stated as a general Proposition, that this Court was ousted of its Jurisdiction, because there might be a Proceeding by Petition; that in this Bill there was an express Averment that there was a Surplus. *Davis* had paid all the Creditors; therefore, to direct a new Choice of Assignees would be to do nothing, because *Davis* would have the Choice; *Ex parte Barfit*, 12 *Ves.* jun. *Everett* v. *Backhouse*, 10 *Ves.* jun.

The Lord CHANCELLOR.

If this Demurrer stood merely on the Point of Multifariousness alone it must be allowed, and I will state the Facts shortly as to that; *Jones* in 1793 becomes a Bankrupt, and a Commission issues which is now in full Force; in 1795 he takes the Advantage of an Insolvent Debtor's Act, the Operation of which is, that the Assignee under the Insolvent Debtor's Act is entitled to take from the Assignee under the Commission, the Surplus after the Creditors have been paid Twenty Shillings in the Pound and Interest. *Farmer* dies, and his Representatives are not brought before the Court. The Representatives of *George*, the other Assignee, are. The Bill charges Collusion between *Long*, the Assignee under the Insolvent Debtor's Act, and *Davis*, and prays an Account against *Long*. Though the Bill seeks an Account against the Representatives of *George*, it does not charge any Collusion between them and *Long*, and they could only be brought together on a different Case. If therefore the Representatives of *George* are entitled to demur, or if *Long* is entitled to demur, so is *Davis*.

But

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But there is a much more important Ground of Demurrer to this Bill, and I am anxious to state the particular Circumstances as to that. The Bankruptcy took place in 1793, and it makes no Difference that *Jones* took the Benefit of a subsequent Insolvent Debtor's Bill, at least in this respect, as the Assignee under the Insolvent Act may come here by Petition, and as it is a Part of the Jurisdiction in Bankruptcy to hear the Bankrupt in respect of his Interest in the Surplus of his Estate, the Assignee under the Insolvent Act stands in his Place as to that. After the Death of *George* an Assignee was chosen, but the Bill expressly alleges that he has not accepted the Office, so that there is nobody as Assignee representing the Estate, and there is not enough on this Bill to infer that the Creditors are satisfied. If it should happen that the Creditors choose an Assignee, he may petition, or any Creditor may petition against all *Davis's* Acts since the Commission, but it is a different Question whether they must not proceed by Bill as to his Acts prior to the Commission, unless he had proved under the Commission, and would not give up the Proof. The Demand then comes to be considered in this Point of View, can one Creditor file such a Bill as this? If he can, I must look to what the Court can do on a Decree as well as to the Creditors under the Bankruptcy, as under the Insolvent Act. If the Assignee or any Creditor should petition, and the *Chancellor* should make an Order pronouncing on the Conduct of *Davis*, that Order must be either final as to the Suit, or a Nullity. If one Creditor can file such a Bill every Creditor can; when the Court directs a Bill it is as ancillary to the Purposes of the Petition, and in every other Petition on the same Subject the Court will recognize the Bill; but when such Bill is filed without its Direction, it operates as an Injunction. It is not enough that the Court would not disapprove of such a Bill; taking this Case to be true on the Bill a

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Petition might be presented, and I am loath to constitute such a Precedent, as the Bar cannot furnish me with an Instance of, and therefore this Demurrer must be allowed.

LINCOLN'S INN HALL. *April* . 1811.

Ex parte MAGENNIS.

A Trading to support a Commission depends not upon the Quantity, but the Intention; and it is a Question for a Jury, whether there is enough to evidence that Intention.

THIS was a Petition for a Supersedeas, on the Ground of there not having been a sufficient Trading.

The Bankrupt kept a Public-house, and as it appeared on the Affidavits, had not sold Liquor in other Quantities at a Time than Beer in Pots or Pints, Wine by the single Bottle, or in Pints or Half Pints, and Spirits in Half Pints or Glasses.

Mr. *Bell*, for the Petition.

Mr. *Hart*, *contra*.

The Lord CHANCELLOR.

The Question depends not on the *Quantum* of Dealing(*a*), but the Intention, and it is enough if a Man will sell to any one who comes to buy: it must be left to a Jury to say, whether there is enough of that Out-door Dealing to evidence the Intention. I do not mean to say, that merely stopping at the Door as a casual Customer is sufficient;

(*a*) *Patman* v. *Vaughan*, 1 T. R. 572. *Bartholomew* and *Sherwood*, *ibid.* 573. *Cooke's* B. L. 53, *et* seq. *Vide Ex parte Moule*, 14 *Ves.* jun. 603.

but

but if any who sends for a Bottle may have it, that is evidence.

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Ex parte MAGENNIS.

I cannot supersede this Commission without an Action.

LINCOLN'S INN HALL. *March 5.* 1811.

Ex parte SUTTON.

MR. *Hart* applied that a Commission might be resealed in which, by Mistake, the Bankrupt had been described by a wrong Christian Name. As the Estate was very small he hoped it would not be put to the Expence of a new Commission.

The Lord CHANCELLOR made the Order, directing a new Docket, and that the Affidavit should be re-sworn, and a new Bond given *(a)*.

(a) Ex parte Thomson, 9 *Ves.* jun. 207. *Fisher's* Case, Vol. X. 190. *Burrows's* Case, *ibid.* 286.

LINCOLN'S INN HALL. *April* . 1811.

Ex parte SANDEN.—In the Matter of GRIG.

ON the 8th *October* a Commission having issued against *Grig*, he called a Meeting of his Creditors and proposed a Composition; this Meeting was adjourned

If a Person knowing that a Commission supersedeable under Lord *Rosslyn's* Order, 26th *June* 1793, is to be proceeded in, takes out another, he will be liable for the Costs.

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Ex parte SANDEW.—In the Matter of GRIG.

from Time to Time, and the Commission kept unexecuted till the 8th *December* following *(a)*, when it was resolved to carry it into Effect. On the 10th *December* the Solicitor of a Creditor who had attended the several Meetings of Creditors, called on the Solicitor who had taken out the Commission, and asked him what was to be done under it. The latter replied it was to be carried into Execution; that he had summoned the *Quorum* Commissioners, and shewed him the provisional Assignment, asking him whether he had any Intention of taking out another Commission. The former replied, "I strike "another Docket when there is a Commission in Exist-"ence;" however, he that same Evening sent Instructions to Town, to take out another Commission, which was done; the Solicitor to the Commission, apprehensive of his Intentions, did the same, but was too late. The present Petition was to supersede the second Commission so taken out, at the Costs of the Solicitor, and the Creditor who had employed him; but the Assignees having, previously to the Petition's coming on to be heard, removed the second Solicitor and appointed the other in his Place, the only Point now was the Question of Costs.

Mr. *Hart*, and Mr. *Cooke*, in support of the Petition contended, that the Court would never permit a Solicitor, knowing that a Commission was intended to be proceeded in, to supersede it, and put the Estate to the Expence of another.

Sir *Samuel Romilly*, *contra*, insisted, that unless the second Solicitor by his Conversation with the other had contrived to make the Commission supersedeable by the Creation of a Delay, which would not otherwise have taken

(a) Vide Lord *Rosslyn*'s Order, 26th *June* 1793, 2 *Cooke* B. L. 284.

place;

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Ex parte SANDEN.—In the Matter of GRID.

place; there were no Grounds for the Application; that the Estate was not injured, as the first Solicitor meant to take out another Commission.

The Lord CHANCELLOR,

On the opening of the Petition, expressed his Opinion that the Mode in which it struck him, was as to the Damage done to the Bankrupt's Estate; and that if the first Solicitor did not mean to have taken out another Commission, he would make the one who did, pay the Costs; but it seemed to be merely a Race between them. His Lordship, after stating the Petition, said, he would not interfere; and would not permit the Costs of a superseded Commission to be paid out of the Bankrupt's Estate (*a*).

No Order was made.

(*a*) *Vide Ex parte Ellis*, 7 *Ves.* jun. 135. *Ex parte Leicester. Ex parte Layton. Ex parte Hardwicke*, 6 *Ves.* jun. 429, *et seq.*

LINCOLN'S INN HALL. *April* 1811.

Commission on a concerted Act of Bankruptcy, though carried on *bonâ fide* and without Collusion, superseded with Costs.

Ex parte GOUTHWAITE.—In the Matter of DUCKWORTH.

THE Petitioner had, at the Spring Assizes at *Lancaster* 1810, obtained a Verdict against *Duckworth* subject to a Case. *Duckworth* applied to a Person of the Name of *Robertson*, and told him, that if *Gouthwaite* succeeded in the Case, his Execution would sweep

1811.

Ex parte GOUTHWAITE. In the Matter of DUCKWORTH.

away the whole of the Property, and therefore it would be better he should be a Bankrupt. *Robertson* applied to a Creditor of the Name of *Lyon*, and appointed him to call on *Duckworth* the next Morning, which he did, and was denied. *Lyon* then took out the Commission, which he carried on hostilely against the Bankrupt; the Object was to supersede the Commission on the Ground of its having issued on a concerted Act of Bankruptcy.

Mr. *Leach* resisted the Application, on an Affidavit by *Lyon*, stating, that he called on the Bankrupt in consequence of his Appointment with *Robertson*, and had no Idea that he would have been denied (*a*); and that even if the Act of Bankruptcy had been concerted, it was not a friendly Commission, but had been conducted *bonâ fide* and not in Collusion.

The Lord CHANCELLOR.

Without Doubt a Commission may be taken out to defeat an Execution, but then it must not be the Commission of the Bankrupt. The Bankrupt meant fairly, but it would be leaning too much towards this Affidavit to say, this is not a concerted Act; it is hard upon *Lyon*, but this Commission must be superseded with Costs.

(*a*) *Cooke's B. L.* p. 84.

Ex

1811.

Ex parte ROWLANDSON.—In the Matter of THOMAS and ROGERS.

Feb. 4. LINCOLN'S INN HALL.

IN the Month of *September* 1808, *Thomas*, at that Time an uncertificated Bankrupt under a Commission which had issued against him in 1802, entered into an Agreement with *Rogers* to purchase Goods in *London* to the Amount of £1400 on their joint Account, with which *Thomas* was to proceed to *Cadiz*, and there dispose of; they were to be equally interested in or liable to whatever Profit or Loss might arise on such Sale, and a Memorandum to that Effect, bearing Date 3d *September* 1808, was drawn up and signed by them. Conformably to that Agreement Goods to the Amount of £1400 and upwards were purchased by *Thomas*, great Part of which were paid for by his Drafts on *Rogers*, and were shipped under the Charge of *Thomas* to *Cadiz* to be there sold by him.

Thomas returned to *London* in *January* 1809, before he had disposed of the whole of the Adventure, and shortly after entered into a fresh Arrangement with *Rogers* under the following Memorandum: "I do agree to give "*Thomas* half the Profits he makes on my Goods instead "of a Commission, after Shipping, Freight, and every Ex- "pence paid, I pay *Thomas*'s Passage out, *February* 29th "1909." *Thomas* again went out, and established himself at *Cadiz*, and Goods were shipped to him by *Rogers* to a considerable Amount. About *December* 1809, they became embarrassed in their Affairs; in *July* 1810, *Thomas* returned to *London*, and was enabled by the Operation of Sir *Samuel Romilly*'s Act to obtain his Certificate under the Commission which had issued against him in 1802.

A. and *B.* Partners; separate Commissions issue against them; *A.* obtains his Certificate, but before it is confirmed by the *Lord Chancellor*, a joint Commission issues against him, and *B.* upon a Petition that *A.*'s separate Commission might be superseded, the *Lord Chancellor* directed the joint Commission to be superseded, on the Ground of length of Time; and *A.*'s having obtained his Certificate, and a Doubt whether there were any joint Effects.

On

1811.

Ex parte ROWLANDSON. —In the Matter of THOMAS and ROGERS.

On 17th *September* 1810, a separate Commission of Bankrupt against him, under which he had passed his last Examination, and his Certificate was then lying before the *Lord Chancellor* for Confirmation. A separate Commission had also issued against *Rogers*, and on the 27th *November* following, a joint Commission against both *Thomas* and *Rogers*. The Assignees under the joint Commission now presented this Petition, praying, that the separate Commission against *Thomas* might be superseded, on the Ground of their having discovered a Partnership to have existed between *Thomas* and *Rogers*.

By an Affidavit filed in Opposition to the Petition, *Thomas* insisted that he was merely the Agent of *Rogers*; that the Agreement of 1808 was entirely closed, and all the Creditors under it satisfied: and that the Goods purchased under the last Agreement, had been purchased by *Rogers* alone, and on his sole Responsibility.

Mr. *Hart* and Mr. *Cooke*, in support of the Petition argued, that as the Affairs of the Bankrupts could be more conveniently managed under the joint Commission, that was a Ground for superseding the separate Commission, provided the joint Commission could be sustained. That would depend upon the Question whether *Thomas* and *Rogers* were Partners or not; to prove the Partnership they read and relied on the before-mentioned Memorandums of Agreement, and on several Extracts from Letters written by *Thomas* while at *Cadiz*, in which he had addressed *Rogers* as a Partner; though it was not a Partnership publicly to the World, it was in Fact a Partnership. A joint Concern in Profit and Loss, or any Contract to share Profits will make Persons Partners. *Hesketh* v. *Blanchard*, 4 *East*. 44. *Waugh* v. *Carter*, 2 *H. B.* 235, *Gouthwaite* v. *Duckworth*, 12 *East*. They mentioned the Commission against *Boylston*, *Lane*, and *Fraser*.

The

1811.

Ex parte ROWLANDSON.—In the Matter of THOMAS and ROGERS.

The Lord CHANCELLOR.

In *Lane* and *Fraser* how was the Property divided? If I dealt with them as my visible Debtors, you could not compel me to resort to *Boylston*. Suppose a Creditor to have said I dealt with *Lane* and *Fraser*, what Answer could you make to that Creditor? Are you sure in *Lane* and *Fraser* it was a Commission against the three?

Mr. *Cooke*.

The Commission against the three, *Boylston*, *Lane*, and *Fraser*, was established after great Opposition.

Sir *Samuel Romilly* and Mr. *Roupell*, for *Thomas*, insisted, that *Thomas*, at the Date of this Agreement, was an uncertificated Bankrupt, *Rogers* knew that, and was aware there could be no Partnership. The Goods were purchased on the Credit of *Rogers*; the Effect of this Agreement was, that the Property should be the separate Property of *Rogers*, and if there is no joint Property there can be no joint Commission. The Assignees of *Rogers*'s separate Estate should be heard *(a)*. A Commission of Bankrupt being a Dissolution of Partnership, an uncertificated Bankrupt cannot form a Partnership, which would have the Effect of making his Assignees, Tenants in Common with the other Partner.

1811.

February 5.

The Lord CHANCELLOR,

Had, on a former Day, stated his Opinion, that it was impossible to say as to third Persons they were not Partners, the Ground being settled, that if a Man, as a

(a) The Assignees under the joint Commission were also the Assignees of *Rogers*'s separate Estate.

Reward

1811. *Ex parte* ROWLANDSON.—In the Matter of THOMAS and ROGERS.

Reward for his Labor, chooses to stipulate for an Interest in the Profits of a Business, instead of a certain Sum proportioned to those Profits, he is as to third Persons a Partner, and no Arrangement between the Parties themselves could prevent it; but he did not think there were any joint Effects, and put it as a Question, whether in that Case the Court would supersede a separate Commission, because there happened to be a joint Commission capable of being maintained.

Feb. 23. His Lordship now, after stating the Petition, said, I have looked into the Proceedings against *John Thomas*, and will not supersede his Commission. I think I cannot do an Act of greater injustice than in *February* 1811, to supersede a Commission issued in *September* 1810, and in the Proceedings under which I find nothing objectionable, and this to keep alive a joint and another separate Commission. A Species of Application I am unwilling to attend to, not but that there may be Circumstances under which such an Application would be attended to, but I see no Ground for staying *Thomas's* Certificate, except that this joint Commission has been taken out.

It was ordered that the Certificate of *Thomas* should be allowed, the joint Commission superseded, and that the Commissioners under the Commission issued against *Thomas* should keep distinct Accounts of the joint and separate Estate, and the Creditors be at liberty to go in and be admitted Creditors for what they should be able to substantiate.

Ex

1811.

Ex parte ANDERSON.—In the Matter of LOWNDES and Another. *May* 25.

A Petition to stay a Certificate, is an exception to the regular Course of Proceedings, and may be heard out of its Turn.

It is no Objection to the Certificate, that the Assignees have permitted the Bankrupts to carry on Business on the same Premises, and in the same Firm, and to continue in their Houses, elegantly furnished, &c. or that the Bankrupts have retained in their Hands Money as Assignees under other Commissions.

THE Object of this Petition was, that the Petitioners might be let in to prove certain Debts under the Commission, and that the Certificate might in the mean Time be stayed.

The Grounds upon which the Allowance of the Certificate was resisted were, a concerted Act of Bankruptcy; that the Assignees under the Commission had permitted the Bankrupts to carry on their Business on the same Premises, and in the same Firm, and to continue in the Possession of their Houses which the Petition alleged were valuable, and furnished with costly and extravagant Furniture, and stored with great Abundance of Wines and Liquors; that the Bankrupts had at the Time of the Bankruptcy in their Hands many Sums of Money belonging to the Estates of other Bankrupts, to which they had been Assignees, which they had neglected to pay into the Bankers appointed under such Commission; and that they or one of them had, as the Petitioners believed, frequently in one Day lost more than £5, and more than £100 within twelve Months in playing at or with Cards, &c. (*a*).

To the last Allegation the Affidavit of the Bankrupts was, that they never jointly or individually in one Day lost more than £5 or more than £100 within twelve Months before they became Bankrupts, at or with Cards, Dice, &c.

Mr. *Agar*, in support of the Petition (which had been placed at the Head of the Paper by Order) in Addition to the Objection already stated, insisted that the Petition ought not to be heard out of its regular Turn.

(*a*) 5 *Geo.* 2. c. 30. s. 12.

Sir

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Ex parte ANDERSON.—In the Matter of LOWNDES and Another.

Sir *Samuel Romilly*, and Mr. *Montague* for the Bankrupts.

The Lord CHANCELLOR.

Where the Question is, whether a Man is to go into a Gaol, or to have the Benefit of his Certificate, I do not think it wrong to make it a Case of Exception to the regular Course of Proceedings, and as it can be no Injury to the Petitioners, to hear it immediately. I have often thought it a Hardship, it is not for me but for the Legislature to relieve it, that when the Creditors requisite in Number and Value have certified their Consent to the Allowance of the Bankrupt's Certificate, a Person meaning to oppose it should not state candidly the Objection, and give the Bankrupt an Opportunity of setting himself right, but on the contrary should lie, by suffering him to solicit all the Creditors perhaps but himself, and then meet him here ignorant of the Objection, and perhaps unprepared from his Poverty to defend himself. In this Case the Debts are £215,901:0s:6*d.* and of those £164,779 have signed, and the Law tells me, that where Creditors not being bound so to do, but acting from their own free Will certify to me the Bankrupt's Conformity, and where the Commissioners also certify to me that three-fifths of the Creditors in number and Value have signed, and that they, speaking judicially, have no Reason to be dissatisfied, the Great Seal is bound, unless the Law and the Practice say otherwise, to allow the Certificate; and I own I was surprized at Hearing that the Law in this Respect was relaxed, because I ever thought that the Court had gone a great Way in requiring more to be done than the Letter of the Law requires.

The first Objection is a concerted Act of Bankruptcy; but from what am I to infer that? I find it proved that two Creditors,

Creditors, neither of them the petitioning Creditors, apply to these Bankrupts, who were, it is quite clear, pressed for the Ground by their Embarrassments, and are denied; and that the Preparation for striking the Docket was made a Day or two before that Denial: these I admit are Circumstances to leave as Evidence of Collusion to a Jury, but do not in themselves constitute that Objection, since I believe it is every Day's Practice, however reprehensible, to state Belief as to Acts of Bankruptcy, founded merely on the Inference arising from the Circumstances of the Bankrupt, and which they think they will afterwards be able to substantiate.

The next Objection is, that the Bankrupts are living in good Houses; it is not said that they have not made a full Disclosure of their Effects: shall I say therefore after these Gentlemen have made a full Disclosure of their Effects, after they have been exposed to a most sifting Examination, without finding any Concealment, that because they have been permitted with their Families to reside in these Houses, that I shall on that Ground refuse their Certificate?

The next is, as to their having retained Money in their Hands as the Assignees under other Bankruptcies; as to that, the Law says, that their Certificate shall be affected by Misconduct, not before the Bankruptcy, but under the Bankruptcy, and the late Act of Parliament has given a Remedy for this Mischief *(a)*.

(a) 49 *Geo.* 3. c. 121. By s. 4, Assignees wilfully retaining or employing Money for their own Benefit, are to be charged 20 *per Cent.* on the Money so retained or employed; and by s. 6. if such Assignees become Bankrupt, and have £100 or upwards of the Bankrupts Estate wilfully retained or employed for their Benefit, their Certificates shall not discharge their future Effects in Respect thereof.

The

1811.
Ex parte ANDERSON.—In the Matter of LOWNDES and Another.

The other Objection is, that they have commenced their Trade again in their own Names, and under the old Firm; to which the Answer is, if they make a full Discovery they may set up Trade again immediately; and how are the Creditors injured by this? Since all their Property acquired before the Certificate belongs to their Assignees; but it is said the Assignees should not have permitted it; be it so: but is that any Reason why I should refuse this Certificate?

The last Ground is the Gaming, depending on a speculative Affidavit, endeavouring to fish out that Fact by a Statement of Belief, and met by an Answer which, in my Opinion, is quite sufficient. It appears to me, therefore, that there is no Ground for staying this Certificate, and that under all the Circumstances, this Petition must be dismissed with Costs.

1811.
June 13.
Trinity Term.

Ex parte DOWNES.

THE Petitioner had taken from the Bankrupt a Mortgage as a Security for his Debt; he was a second Mortgagee, and being ignorant of the Value of the Security, had elected to abandon it and come in under the Commission. The Security having turned out more valuable than was expected, he now applied on the Ground of his having been deceived, and upon an Affidavit of his having made his Election through Mistake, to be remitted to his Pledge.

Sir *Samuel Romilly*, in support of the Petition, mentioned *Ex parte Beilby*, 13 *Ves.* jun. 70.

Mr.

Mr. *Hart* opposed it.

1811.
Ex parte
DOWNES.

The Lord CHANCELLOR,

From the Inconvenience which might arise from admitting such Applications, refused to make the Order.

ANONYMOUS.

1811.
Trinity Term.

MR. *Agar* moved that the *Lord* CHANCELLOR would be pleased to answer a Petition which had not been signed by the Petitioner, according to the Directions of his Lordship's General Order, 12th *August* 1809 *(a)*. He stated that the Parties lived in the Country, that the final Dividend against which the Petition was intended to be presented, would be made before the Signature could be obtained; and undertook that it should be signed before it was served.

The Lord CHANCELLOR

Refused the Application, and said, that he would not dispense with the Order, unless under special Circumstances verified by Affidavit.

(a) 2 Cooke, B. L. 297.

1811.

June 12. *Ex parte* DICKSON.

THE Bankrupt had given to a Creditor two Bills of Exchange, one for £100, and the other for £92.

The Creditor parted with the Bill for £92; and the £100 Bill not being paid when due, brought an Action on it, and took the Bankrupt in Execution The £92 was shortly afterwards returned to him dishonored, and he took it up and proved it under the Commission.

This was an Application by the Bankrupt to be discharged out of Execution, on the Ground that such Proof was an Election to relinquish the Action, and come in under the Commission *(a)*.

There was an Affidavit by the Bankrupt, that both the Bills were given for a general Balance owing from him to the Creditor, to whom he was Agent; and a counter Affidavit by the latter.

Sir *Samuel Romilly*, in support of the Petition.

Mr. *Agar*, *contra*.

The Lord CHANCELLOR

Observed, that it was a remedial Law, and must receive a liberal Construction; and made the Order on the Creditor, without prejudice to his proving under the Commission.

(a) Vide 49 *Geo.* III. c. 121. s. 14.

END OF THE FIRST PART.

CASES

IN

BANKRUPTCY, &c.

LOWNDES, AND OTHERS, Assignees of LEES, a Bankrupt.—Against ANDERSON, AND OTHERS. *Friday*, Nov. 23, 1810.

13 *East.* T. R. 130.

THE Plaintiffs were the Assignees of *William Lees*, a Bankrupt, under a Commission dated the 5th *August*, 1807, upon an Act of Bankruptcy committed on the 3d of that Month. The Defendants were Bankers in *London*. On the 11th of *April*, 1807, *Lees* remitted to the Defendants, a Bill of Exchange, on his general

Bank Notes cannot be followed into the Hands of *bonâ fide* Holders, for valuable Consideration, without Notice.

Therefore where a Trader, after a Commission of Bankrupt, wishing to redeem a Bill of Exchange, before remitted to his Bankers, to whom he was indebted beyond the Amount, secretly employed an Agent, unknown to the Bankers, and placed in his Hands, for that Purpose, Four other Bills, of about the same Value; and such Agent, after endeavouring in vain to prevail on the Bankers to take in Exchange such Four Bills, for the One, passed off the Four Bills in the Market, and obtained Bank Notes for them, with which he took up the first Bill in the usual Way. Held, that the Assignees could not recover from the Bankers the Amount of such Bank Notes, they being Holders of them, *bonâ fide*, for a valuable Consideration, and without Notice of the true Owners.

1810.

LOWNDES, and Others, Assignees of LEES, a Bankrupt.— Against ANDERSON, and Others.

Banking Account, dated the 1st *September*, 1806, drawn by him, and accepted by *Dawson* and *Walmsley*, of *Lancaster*, for £2509:19*s*:0*d*. payable Twelve Months after Date to his Order, and indorsed by him, and also by *Gregsons* and Co. of *Liverpool*. *Lees* had been in the Habit of making Remittances to, and drawing on the Defendants, as suited his Business; and was at the Time of making this Remittance, and still was indebted to them very considerably above the Amount of all their Securities. On the 27th of *July*, 1807, *Lees* knew of his approaching Insolvency, and being particularly desirous to get this Bill for £2509:19*s*:0*d*. into his Possession, desired his Clerk, *B. Prescott*, to go to *London* immediately for that Purpose; he gave him Four Bills to the Amount of £2525:3*s*:2*d*. and directed him to do the Business through the Medium of a third Person. On the 4th of *August*, *Prescott*, according to his Instructions, gave these Bills to a Friend of his in *London*, who was unknown to the Defendants; soon after the Stoppage of *Lees*, and before the Defendants had heard of the Commission of Bankrupt, this Person called at the Defendants' Banking-house, and said he came from *Lowndes* and *Bateson*, who were Merchants in *Liverpool*, to take up *Dawson* and *Walmsley*'s Acceptance, and tendered the Four Bills which the Defendants refused.— Some Days after this the same Person made a second Application to the Defendants for the same Purpose, and with the same Success. When this second Application was made, the Defendants had received a Letter from *Lees*, dated Two Days before, stating, that he had made Arrangements to pay Fifteen Shillings in the Pound immediately, and Five Shillings in a short Time; that he wished the Defendants to take the Bills they had before refused, because *Dawson* and *Walmsley*'s Acceptance might not be paid when due; but that if Mr. *Lowndes*

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Lowndes had it in his Possession, he had the Means of Payment in his own Hands. On the 26th of *August*, 1807, the same Person who had before applied to the Defendants, paid to them, by *Prescott's* Directions, £2510 in Bank Notes, which *Prescott* had procured by discounting the Four Bills, and received Cash thereout £3:1*s*:10*d*. leaving a Balance of £2506: 18*s*: 2*d*. being the Amount of the Bill for £2509: 19*s*. deducting Nine Days Discount, and the Bill for £2509: 19*s*. was then delivered up by the Defendants. The Defendants at the Time of this Payment knew that the Commission against *Lees* had been issued. There was no other Evidence that they knew that the Bills offered for the Purpose of taking up *Dawson* and *Walmsley's* Acceptance, were the Property of *Lees;* nor that the Cash they received was the Produce of them; nor that the Person who applied to them, came from *Lees*.— The Question was, whether the Plaintiffs were entitled to recover? If they were, a Verdict, which had been found for them before Lord *Ellenborough*, at *Guildhall*, was to stand: if otherwise, a Non-suit was to be entered.

Lord ELLENBOROUGH, C. J.

It would be a grievous Inconvenience if Bank Notes could be followed in the Manner now attempted, through the Hands of *bonâ fide* Holders, for a valuable Consideration, without Notice. The Defendants had before refused to exchange the Bill for £2509: 19*s*. for the Four Bills; but there was nothing to prevent their disposing of it, if they pleased, to any Person who tendered them the Amount in Gold or Bank Notes; and when they afterwards, *bonâ fide*, for a valuable Consideration, and without

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out Notice, received Bank Notes from a Person w came to take up the Bill, they cannot be held accounta for them. The Case of *Clarke* v. *Shee (a)*, is deci upon the Question.

Grose, J. *Le Blanc*, J. and *Bayley*, J. concurr Non-suit to be entered.

(a) Cowp. 200. That a Bank Note cannot be followed specifically, and as distinguishable from Money into the Hands of *bonâ fide* Holders, for valuable Consideration without Notice. *Vide Miller* v. *Race*, 1 *Burr.* 452, but where it has been fraudulently obtained, and been stopped at the Bank, is incumbent on the Hold to clear himself from all C nection, or Privity with Fraud, before he can obt Payment on it. *Solomon The Bank of England*, *East.* Rep. 137.

1810, *January* 25.

BRETT, Assignee of HARRISON, a Bankrupt, Against LEVETT.

13 *East.* T. R. 213.

Bills of Exchange to the Amount of £100, drawn before an Act of Bankruptcy, but becoming due afterwards, are a sufficient petitioning Creditor's Debt.

UPON a Rule for setting aside the Verdict, obtai by the Plaintiff, for £676:6*s*:5*d*. and for enter a Non-suit. The only Question at Law, arose upon

Note. The Bankrupt was indebted to different Persons, at the Time of the Act of Bankruptcy, in more than £100, even allowing the Rebate of Interest, upon the Bills at that Period.

petition

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petitioning Creditor's Debt; as to which the Facts were these. The Act of Bankruptcy was on the 28th of *December*, 1809; the Commission of Bankrupt, dated the 8th of *February*, 1810, issued upon the Petition of *Brett* and *Gilbert*, Bankers, whose Debts arose upon Two Bills of Exchange for £50 each, both drawn by the Bankrupt, and finally dishonored by the Drawee; both Bills became due after the Act of Bankruptcy, but before the Commission issued. The Objection was, that *at the Time of the Act of Bankruptcy*, on the 28th of *December*, 1809, there was not £100 due to the petitioning Creditors; but only that Sum, minus the Rebate of Interest, for the Times which the Bills had then to run.— But at that Period there were other small Creditors of the Bankrupt, whose Debts, together with what was then due on these Bills to the Bankers, amounted to more than £100, and the Bills were both due before *Brett* and *Gilbert* petitioned for the Commission *(a)*.

Dauncey and *Puller* shewed Cause against the Rule; they relied on the plain Words of the Statute 7 *Geo.* I. c. 31.

(a) Another Question was made by *Peake* on moving for the Rule, which arose upon the Admissibility of Evidence at the Trial. In order to account, for want of Notice to the Drawer, of the Dishonor of the first Bill, a Witness was called who spoke to a Conversation between the Plaintiff and the Drawer, subsequent to the Day of the Act of Bankruptcy, when the Drawer, in answer to a Question of the Plaintiff's, if the Bill would be paid, said, no; it would come back. It was objected that an Admission by the Bankrupt, after the Act of Bankruptcy, was not sufficient to do away the Want of Notice. The Learned Judge, *(Le Blanc,)* over-ruled the Objection, and the Court refused the Rule on that Point. *Dowton* v. *Cross*, 1 *Esp.* N. P. Cases, 168. *Chapman* v. *Gardner*, 2 *H. Blac.* 279.

Want of Notice to the Bankrupt Drawer, of the Dishonor of a Bill, may be supplied by Evidence of his acknowledgment after the Act of Bankruptcy, that it would not be paid.

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c. 31. and the 5 *Geo.* II. c. 30. s. 22. *Glaister v. Hewer (a).*

Jervis and *Peake, contra,* relied on the Statute 5 *Geo.* II. c. 30. s. 23. *Bingley* v. *Maddison (b). Ex parte Wainman (c). Ex parte Thomas (d).* And an Anonymous Case in 2 *Wilson,* 135.

Lord ELLENBOROUGH, C. J.

The Words of the Statute 7 *Geo.* I. c. 31. seem to have decided the Question. For that Statute which admits of the Proof under Commissions of Bankrupt, of Debts arising on Bills, Notes, and other Securities, payable at a future Day, provides that no Creditor upon such Securities shall be deemed to be a sufficient Creditor to Petition for any Commission, "until such Time as such "Debt shall become due and payable." Then can it be doubted that the Legislature intended, that when the Debt did become due to the Holder of such Securities, he might be a petitioning Creditor. So the Law stood till the Statute 5 *Geo.* II. which repealed the Prohibition, and consequently enables the Holders of such Securities, payable at a future Day, to become petitioning Creditors where their Debts are of sufficient Amount. In this Case, however, the Assignee of the Bankrupt does not want to remove the Prohibition of the Statute 7 *Geo.* I. because the Debt of the petitioning Creditor to the full Amount of £100 upon the Bills, was actually become due and payable, at the Time of the Petition, within the precise Words of that Act. Therefore, without wandering into Cases, the Application of which to this Case can

(a) 7 T. R. 499. *Vide Bamford* v. *Burrell,* 2 *Bos. & Pull.* 1.

(b) *Cooke's* B. L. 19.

(c) *Ibid.* 21.

(d) 1 *Atk.* 73.

only

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BRETT, Assignee of HARRISON, a Bankrupt.— Against LEVETT.

only tend to mislead us, where the Act of Parliament is plain, it is clear that this petitioning Creditor's Debt, being due at the Time of petitioning, is the very Case which was contemplated to be sufficient by the Act of 7 *Geo.* I.

Grose, J. was of the same Opinion.

Le Blanc, J. this is not to be considered as a Decision upon a Case where the Bankrupt was only indebted at the Time of the Act of Bankruptcy, upon Bills to the Amount of £100, payable at a future Day; for it is clear that he was at that Time indebted altogether to more than that Amount to different Persons, even allowing the Rebate of Interest on the Bills. That this is a good petitioning Creditor's Debt, is decided by References to the Words of the Statute.

Bayley, J. expressed himself to the same Effect.

Rule discharged.

STEDMAN

1811,
May 7.

STEDMAN *v.* MARTINNANT, *(a)*.

13 *East*. T. R. 427.

The Plaintiff having accepted a Bill for the Accommodation of the Defendant, the latter afterwards, and before the Bill became due, committed an Act of Bankruptcy, followed by a Commission, which was superseded. Time was given to the Bankrupt by his Creditors; and the Plaintiff thereupon accepted another Bill for the same Debt, with the Addition of Interest and Stamp. Held, that this was a Continuation of the same Suretyship; and a second Commission having afterwards issued before the Plaintiff's second Acceptance became due, which was paid when due. Held, that the Amount was proveable as a Debt under such Commission, by virtue of the Stat. 49 *Geo.* III. c. 121. s. 8, and was consequently barred by the Certificate.

ON the 5th of *January*, 1807, the Plaintiff, for the Defendant's Accommodation, accepted a Bill of Exchange, drawn by him for £234: 11*s*. payable at Seventy Days after Date; and the Defendant promised to provide the Plaintiff with Money to pay such Bill. The Bill became due on the 19th *March*, 1807, and the Defendant not providing for it, was dishonored. On the 18th of the same *March*, a Docket was struck, and on the 21st, a Commission of Bankrupt was issued against the Defendant, which was superseded on the 15th of *April*. A Meeting of the Defendant's Creditors was then held, and Time was given him to pay his Debts by Instalments. On the 9th of *June*, the Plaintiff accepted another Bill for the Accommodation of the Defendant, for £237: 11*s*: 10*d*. which became due on the 12th *September*,

(a) The Form of the Action was *Assumpsit*, and the Plea Bankruptcy; to an Action by a Person who has become Surety for the Bankrupt, after Act of Bankruptcy, and paid the Debt after the Commission, the Bankrupt cannot avail himself of his Certificate under the general Issue, but must plead it specially. 12 *East*. 664. Such Plea in *C. B.* must be signed by a Serjeant. 3 *Bos. & Pull.* 171; but need not be by Counsel in *K. B.* 6 T. R. 496.

and

and was on that Day paid by the Plaintiff, for the Defendant's Use, he not providing for the same. This latter Bill was given for the Purpose of taking up the former dishonored one, with the Addition of Interest and Stamp, and was indorsed by *C. Aldrich* as an additional Security to the Holders of the former Bill, who had required the same. A Commission of Bankrupt, issued against the Defendant, dated the 6th *August*, 1807, founded upon an Act of Bankruptcy, committed in the *March* preceding, under which he had obtained his Certificate. The Plaintiff (supposing him entitled to prove,) and the other Creditors of the Bankrupt who had not proved, might have received Dividends equal in Proportion to their respective Debts, without disturbing any Dividends then already made.

The Question was, a Verdict having been taken for the Plaintiff, subject to this Case, whether he was entitled to recover from the Defendant, notwithstanding his Bankruptcy and Certificate; and if not, a Non-suit was to be entered.

Puller, for the Plaintiff, relied upon the Proviso in the 49 *Geo.* III. c. 121, by which, though a Person may prove a Debt, for which he may have become Surety or liable, after an Act of Bankruptcy, yet he may not, if he had Notice of such Act, or of the Bankrupt's Insolvency: and the issuing a Commission, though afterwards superseded, shall be deemed Notice *(a)*. The second Bill was a new Security, absorbing the old Debt; and was given after Notice.

Franklin, contra, was stopped by the Court.

(a) 49 *Geo.* III. c. 121. s. 8.

Lord

1810.

STEDMAN v. MARTINNANT.

Lord ELLENBOROUGH, C. J.

The giving of the second Acceptance, upon the Bill for the prior Debt, did not discharge the o Debt; for which the Plaintiff had become Surety the Act of Bankruptcy; in paying that second Bil Plaintiff was only paying the same Debt, which h liable to pay as Surety for the Defendant upon th Bill. Then is not this a Case within the Eighth Sec the Statute referred to, by which the Surety for a proveable under a Commission, though not paid b till after the issuing of the Commission, shall stand Place of the original Creditor, as to the whole Debt so paid. The Act however provides, that thi not extend to one, who, when he became Surety either Notice in fact of the Act of Bankruptcy comm or implied Notice from the issuing of a Commi though such Commission were afterwards super But in order to affect the Plaintiff's Debt with suc plied Notice, it was necessary for him to bring dow *Commencement* of the Suretyship, to a Period subse to the issuing of such Commission, afterwards supers which he has failed to do; and therefore it stands Debt which was proveable under the Commission, consequently barred by the Defendant's Certificate.

Per curiam (*Le Blanc*, J. absent). *Postea* t Defendant.

WALL.

1811,
May 21.

WALLACE AND OTHERS, Assignees of ANDERSON AND EADES, Bankrupts.—Against BREEDS AND ANOTHER.

13 *East.* Reports, 522.

Where Fifty Tons of Oil were sold, to be paid for by Acceptance, payable at a future Day; and the Purchasers received from the Sellers, an Order on their Wharfingers for Delivery of the Fifty out of Ninety Tons of their Oil; yet, as the Custom of the Trade was for the Casks to be searched by the Sellers' Cooper, and for a Broker, on behalf of both Parties, to ascertain the Foot Dirt and Water in each, (for which Allowance was to be made), and then the Casks were to be filled up by the Sellers' Cooper, at their Expence; all which was to precede the Delivery to the Buyer; held, that the Sale was not complete to pass the Property; but that the Sellers, on the subsequent Bankruptcy of the Buyers, before such Acts done, and Delivery made, might countermand it.

ANDERSON and *Eades*, on the 1st *February*, 1810, before their Bankruptcy, purchased of *Heselton* and *Smith* Fifty Tons of *Greenland* Oil, then lying at the Defendants' Wharf in Casks, at £44 *per* Ton, to be paid for by the Buyers' Acceptance at Four Months from the Expiration of Fourteen Days, to be received at *Griffin's* Wharf in Fourteen Days; *Allowance for Foot Dirt and Water as customary*, and a Sale Note was given to the above Effect.

On the 13th *February*, 1810, *Anderson* and *Eades* obtained from the Vendors an Order for the Delivery of the Oil, as follows: Messrs. *Breeds* and *Farncomb*, *Griffin's* Wharf. Please to deliver to Messrs. *Anderson* and *Eades* Fifty Tons of our *Greenland* Oil, *ex Ninety Tons*. *Feb.* 15, 1810, *H.* and *S.* The Order was sent to the Defendants' Wharf, and received by their Clerk in their Countinghouse, on the 13th of *February*. On the 14th, *Anderson* and *Eades* being insolvent, the Order was countermanded by the Vendors, the Oil then remaining in the same State as at the Time of Sale, it has since been delivered to the Vendors by the Defendants.

Before

1811.

WALLACE and Others, Assignees of ANDERSON and EADES, Bankrupts.—Against BREEDS and Another.

Before Greenland Oil is delivered, it is the constant Custom to have the Casks searched by a Cooper employed by the Seller; and it is also the Custom for a Broker, on behalf both of the Buyer and Seller, to attend to make a Minute of the Foot Dirt and Water in each Cask; and the Casks are then filled up by the Seller's Cooper, at the Seller's Expence, and delivered in a complete State, containing the Quantity sold; none of which Circumstances had taken Place at the Time of the Countermand. At the Time of Sale and Countermand, the Vendors had Ninety Tons of Oil contained in One Hundred and Eighty-one Casks, lying at the Defendants' Wharf.

On the 14th *April*, 1810, *Anderson* and *Eades* became Bankrupts; and their Assignees had obtained a Verdict in Trover against the Defendants, subject to the Opinion of the Court on the above Facts.

Scarlett, for the Plaintiff, compared this to the Case of *Whitehouse* v. *Frost (a)*, and distinguished it from *Rugg* v. *Minet (b)*.

Lord ELLENBOROUGH, C. J.

The Difference between this Case and that of *Whitehouse* v. *Frost*, is, that there nothing remained to be done by the Seller, in order to complete the Sale, as between him and the Buyer: but here it is expressly found, that some material Acts did remain to be done by the Seller, which were to precede the Delivery to the Buyer: and the Courts have frequently laid hold of Circumstances like these, to retain the Property in favour of the unpaid Seller; and before the Oil was measured out, and these things were done, the Delivery was countermanded.

The other Judges concurred in a Judgment of Non-suit to be entered.

(a) 12 *East*. 614. (b) 11 *East*. 210.

ANONYMOUS.

1809.

ANONYMOUS.

2 *Taunton's* Reports, 61.

IN THE COMMON PLEAS. *June* 14.

The Court will not compel Security for Costs on the Ground that the Plaintiff is a Bankrupt, or in *Newgate*.

VAUGHAN, Serjeant, moved that the Plaintiffs might give Security for the Costs in this Action. One of them was a Bankrupt, the other was a Prisoner in *Newgate*: he cited the Case of *Webb* v. *Ward* (*a*).

The Court held, that unless some express Authority could be found to warrant such an Interposition, they could not grant the Rule. The Presumption of the Law is in Favor of the Innocence of the Man in Prison, and the Defendant might sue him for the Costs.

Rule refused.

(*a*) 7 T. R. 296. *Webb* v. *Ward*, was an Action of *Trover* by an *uncertificated* Bankrupt; the Court compelled him to give Security for Costs, on the Ground, that the Action being for *Goods*, they were the Property of the Assignees; and the Action therefore was for their Benefit: but Lord *Kenyon* said, that it could not be laid down as a general Rule, and distinguished it from an Action brought for the Fruits of his personal Labour.

WYBORNE

1809.

June 19. WYBORNE *v.* ROSS

2 *Taunton's* Reports, 68.

A Cognovit is not discharged by Bankruptcy and Certificate.

THE Defendant had given the Plaintiff a Cognovit for the Amount of a Banker's Check, on which he was sued. Afterwards a Commission of Bankrupt issued against him, and he obtained his Certificate. The Plaintiff having lately entered up Judgment, and taken out Execution, *Pell*, Serjeant, moved to set it aside, suggesting that the Cognovit was discharged by Bankruptcy and Certificate.

But the Court observed, that a Cognovit is a mere Acknowledgement of the Amount of the Damages; and where a Man acknowledges the Cause of Action, the Plaintiff may sign Judgment at any Time. This was not like a Warrant of Attorney.

Rule refused.

Nov. 24. ATHERSTONE *v.* HUDDLESTON.

2 *Taunton's* Reports, 181.

ONSLOW, Serjeant, had on a former Day obtained a Rule to shew Cause why the Defendant should not, in pursuance of the Statute 49 *Geo.* III. c. 121. s. 14. be discharged out of the Custody of the Sheriff of *Lincoln*,

Lincoln, as to the Plaintiff's Suit in this Action. The Plaintiff having made his Election, by proving his Debt under the Commission of Bankrupt issued against the Defendant.

1809.

ATHERSTONE v. HUDDLESTON.

Vaughan, Serjeant, shewed Cause against the Rule, on the Ground that the Arrest and Proof of Debt took place long before the Statute. He at first suggested a Doubt, whether the Act gave the Court Jurisdiction to discharge the Defendant. (But the Court was quite clear, that when an Act of Parliament prohibits a Thing, it gives the Courts of Law Power to enforce the Prohibition.)

Mansfield, C. J. *Heath*, J. and *Lawrence*, J. were of Opinion that it was impossible to make the Clause retrospective.

HOLROYD, AND OTHERS, Assignees of LEE *v.* GWYNNE.

Nov. 23.

2 *Taunton's* Reports, 176.

THE Defendant, in *May*, 1807, sold certain Timber to *Lee*. The Parties executed a Contract, by which *Gwynne*, in consideration of £127, paid by *Lee*, in Part of £1139, to be paid at the Times therein mentioned,

A Trader who has no settled Home, or Counting-house, but takes up a temporary Abode at a Public-house, in the Place to which his Business carries him, commits an Act of Bankruptcy by departing from such Dwelling-house, with Intent to delay his Creditors.

The Purchase of one Lot of Timber, with Intent to sell again, is a sufficient Trading. If standing Timber be sold to a Trader, with a Proviso, that in case of Bankruptcy the Vendor may retake it, such Condition is void, under 21 *Jac.* I. c. 18. s. 11. if the Bankrupt has the Disposition of the Goods.

1809.

HOLROYD, and Others, Assignees of LEE v. GWYNNE.

tioned, and of the Covenants therein expressed, granted, bargained, and sold to *Lee*, Three Hundred and Forty-seven Oaks, and Eleven Ash Trees, then standing and growing on certain Lands therein described, with the Tops, and Boughs, and Bark thereof; with ingress for *Lee* to enter upon the Lands, and to cut down, and carry away the Timber, &c. to hold the said Timber unto *Lee*, his Executors, &c. as his own proper Goods and Chattels, to his and their own Use for ever. But in case *Lee* should fail to pay the Purchase-money, or should become Bankrupt or Insolvent, before the several Days of Payment, or before Payment should be made, it should be lawful for *Gwynne* to repossess himself of the Timber, and to sell the same; and after satisfying the principal Purchase-money, or such Part as should be unpaid, and all Charges and Expences, should render the Overplus, if any, to *Lee*. *Lee* entered and cut and converted the Timber. In *June*, 1808, a Commission of Bankrupt issued against him, and *Gwynne*, under the Agreement, repossessed himself of such Part of the Timber, as the Bankrupt had not disposed of, and sold it by Auction.

The Assignees brought an Action of Trover to recover the Value of the Timber so sold. At the Trial, before *Graham*, B. at the *Hereford* Spring Assizes, at appeared that *Lee* usually resided at *Islington*, with his Aunt; he had attended Public Auctions of Timber, from the Year 1806, downwards; but there was no Proof that he had purchased more than Three Parcels, of which this was the First; he had stripped and sold the Bark of this Parcel, and the Tops; he had also sold a Part of the Timber to the Officers of Government, and a small Part for Laths. After he had purchased this Parcel, and while he was selling it, he lodged in a Public-house, at *Bwlth*, in the County of *Brecon*, near the Spot where the Timber grew. He afterwards left that Place, for fear of his Creditors

Creditors, and took an obscure Lodging in *Duke Street, Bloomsbury*. He was at that Time unable to pay his Debts, and for that Reason did not dare to go to *Bwlth*, where his Business was still proceeding. *Graham*, B. thought that no Act of Bankruptcy was proved, and non-suited the Plaintiffs.

In *Easter* Term following, the Court granted a new Trial, on which, at the *Hereford* Summer Assizes, 1809, before *Bayley*, J. the Plaintiff proved the Agreement above stated. The Defendant contended, that under the Proviso, in case of Bankruptcy, he was entitled to a Verdict; but *Bayley*, J. directed the Jury, that if the Defendant had permitted the Bankrupt to exercise such a Controul and Management over the Timber, down to the Time of the Bankruptcy, as to give him the Appearance of being the Owner, he could not resist the Plaintiffs' Demand.—The Jury found a Verdict for the Plaintiffs; and the Learned Judge gave the Defendant Liberty to move to enter a Non-suit.

Williams, in this Term, obtained a Rule *Nisi*, to set aside the Verdict, and to have a new Trial, on the Authority of *Roe* v. *Galliers*, 2 T. R. 133.

Shepherd now shewed Cause, and relied upon the Statute 21 *Jac.* I. c. 19. s. 11. and that a private Contract cannot defeat the Policy of it.

The Court stopping *Shepherd*, called on *Williams* to support his Rule, who admitted that the Case of *Horn* v. *Baker*, 9 *East*. 215, was too strong to be got over, and submitted to have his Rule for a new Trial discharged.

1810, *Jan.* 28.

LINGING *v.* COMYN.

2 *Taunton's* Reports, 246.

If after Judgment obtained, a Plaintiff proves his Debt under a Commission of Bankrupt sued out against the Defendant, and also proceeds against the Bail, they are entitled to their Discharge under 49 *Geo.* III. c. 121. s. 14. and the Court will discharge them on Motion.

ON the 20th of *September*, a Commission issued against the Defendant, and he was declared a Bankrupt. The Plaintiff, who before the Bankruptcy had signed Judgment against the Defendant, proved his Debt under the Commission, on the 7th of *November* last: on the 21st of *November* he sued out a *Capias ad Satisfaciendum*, which, on the 28th, was returned *non est inventus;* he then proceeded by *scire facias* against the Bail. The Defendant obtained his Certificate on the 8th of *December*.

Shepherd, Serjeant, had obtained a Rule *Nisi* to set aside the Proceedings against the Bail, and enter an *Exoneretur* on the Bail-piece, on two Grounds: 1st. That by the Bankruptcy and Certificate the Bail were discharged; 2d. That the Plaintiff having proved his Debt could not, by the Statute 49 *Geo.* III. c. 121. s. 14. proceed at Law.

Best, Serjeant, shewed Cause; he contended that the Bail are fixed on the Return of the *Capias ad Satisfaciendum*, and if the Principal be not then rendered they are liable. *Tymperly* v. *Coleman* (*a*). *Glyn* v. *Yates* (*b*). *Woolley* v. *Cobb* (*c*). *Parry* v. *Berry* (*d*). *Filewood* v. *Popplewell* (*e*). That although by the Statute (*f*), no

(*a*) Cro. *Jac.* 165.
(*b*) 1 *Str.* 511.
(*c*) 1 *Burr.* 244.
(*d*) 2 Lord *Raym.* 1452.
(*e*) 2 *Wilson*, 67.
(*f*) 49 *Geo.* III. c. 121. s. 14.

Creditor

Creditor can prove without relinquishing his Action; yet here, final Judgment being obtained, the Action was at an End. That the Proof was in aid of the Bail, not in discharge of them.

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LIDDLE
v.
COLLYS.

Shepherd, contra, cited *Ray* v. *Hussey, Barnes,* 104.

The Court, without expressing any Opinion on the first Ground, were clear, that by the Statute, the Plaintiff having proved under the Commission, could not take the Defendant in Execution; and the Bail were only liable in case the Plaintiff, having a Right to take the Defendant on a *Capias ad Satisfaciendum,* should be unable so to do. The Action was complete by Judgment, but it was not at an End; a Writ of Execution being a Process in the Action, and a "Benefit thereby," which the Plaintiff is called on by the Act to relinquish.

Rule absolute.

JEFFS *v.* SMITH, (Sheriff of *London.*)

2 *Taunton's* Reports, 401.

If a Trader keeps House, and causes himself to be denied to a Tax-gatherer who calls for Taxes, it is an Act of Bankruptcy.

A TAX-GATHERER called at the House of the Bankrupt to collect Taxes; the Bankrupt was at Home, and was with his own Assent denied. The Jury in Action against the Defendant for falsely returning *nulla bona,* found a Verdict for the Plaintiff against the Act of Bankruptcy, which was prior to the Execution.

1810.
JEFFS
v.
SMITH,
Sheriff of
LONDON.

Best, Serjeant, had obtained a Rule *Nisi* to set aside the Verdict, and enter a Non-suit.

Shepherd, Serjeant, now shewed Cause. A Creditor who is delayed by keeping House, must be one who can sue out a Commission of Bankrupt, or arrest the Party. The Tax-gatherer, whose Demand is rather a Duty than a Debt, might have distrained under a Warrant; but could have taken neither of the other Courses.

MANSFIELD, C. J. I cannot say that the Crown is not a Creditor, and that the keeping out of the Way to avoid that Creditor, is not as much an Act of Bankruptcy as avoiding any other Creditor.

Rule absolute.

June 4.

MATHEW and COUSINS, Assignees of MOORE, a Bankrupt, *v.* SHERWELL.

2 *Taunton's* Reports, 439.

The Assignees of a Bankrupt cannot recover the Amount of a Check paid as by the Bankrupt's Bankers, after the Bankruptcy, to whom the Check was delivered, and the Money paid.

THIS was an Action of Trover for a Check for the Sum of £300, drawn by the Bankrupt on his Bankers, after his Bankruptcy, in favor of the Defendant, who was a Creditor, and who received the Amount.—Verdict for the Plaintiffs £300.

Upon

1810.

MATTHEW and COUSINS, Assignees of MOORE, a Bankrupt, v. SHERWELL.

Upon a Rule to set aside the Verdict, and enter a Non-suit, upon the Ground that the Action ought to have been for Money had and received.

MANSFIELD, C. J. The Plaintiffs proceed upon the Ground that the Check is worth nothing, being drawn without Authority; how then can they recover on it the Sum of £300?

Lawrence, J. Suppose a Bankrupt gives a void Authority to another Man, how can his Assignees be entitled to it?

Chambre, J. How can you sue for a Piece of Paper of no Value?

Rule absolute.

COLLINS and WALLER *v.* NICHOLSON.

2 *Taunton's* Reports, 321.

An Attorney's Bill for soliciting a Bankrupt's Certificate, must be signed and delivered a Month before he can sue thereon.

Obtaining the *Lord Chancellor's* Signature is Business done in Court.

THE Plaintiffs, in an Action, had recovered the Amount of their Bill, for Business done by them as Solicitors for the Defendant, who had been a Bankrupt, in obtaining his Certificate.

Best, Serjeant, had obtained a Rule *Nisi*, to set aside the Verdict, and enter a Non-suit, on the Ground, that the Bill which had been delivered by the Plaintiffs to the Defendant, had not been signed by them, pursuant to the Statute 2 *Geo.* II. c. 23. s. 23.

Shepherd,

1816.

COLLINS and WALLER v. NICHOLSON.

Shepherd, Serjeant, shewed Cause, that this was not Business, in any Court of Law or Equity; but Business done for the Bankrupt, in applying to his Creditors.

MANSFIELD, C. J.

It is now decided, that all Proceedings by Petition to the *Chancellor*, are Proceedings in Chancery; here is a Proceeding in Court. An Application must be made to the *Chancellor*, to have his Signature to the Certificate, and it has long been settled, that where a Bill contains One Item, which is a Proceeding in a Court, all the Residue of the Bill, though it be merely for Conveyancing, is taxable.

The Court concurred in making the Rule for a Nonsuit absolute.

1816, *May* 26.

MOGGRIDGE *v.* DAVIS.

Wightwick's Reports, p. 16.

Money due upon a Judgment for mesne Profits, is not within the 9th Sect. 49 *Geo.* III. c. 121. The Verdict was after the Bankruptcy.

A RULE having been obtained for the Plaintiff to shew Cause why the Defendant should not be discharged out of the Custody of the Warden of the *Fleet*; as to this Action, he having become a Bankrupt, and obtained his Certificate; and the Cause of Action having accrued prior to the Bankruptcy.

Onslow, Serjeant, now shewed Cause, that the Action was for mesne Profits, after a Judgment in Ejectment; and the Defendant having become a Bankrupt before

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MOGGRIDGE v. DAVIS.

before the Verdict, he was still liable; as in trespass for mesne Profits no specific Debt is due until a Verdict. *Gulliver* v. *Drinkwater* (a).

Reader, in support of the Rule, referred to Stat. 49 Geo. III. c. 121. s. 9.

But the Court being of Opinion that the present Case was not within that Section, discharged the Rule.

(a) *Dougl.* 562.

1810, *July* 4.

THOMAS AND OTHERS, Assignees of PARRY, a Bankrupt, *v.* RIDEING AND ANOTHER.

1 *Wightwick's* Reports, 65.

In an Action by Assignees to recover back Money paid by the Bankrupt after he had committed an Act of Bankruptcy, and before the Commission was opened, it is not necessary for them to declare as Assignees.

PREVIOUSLY to the Act of Bankruptcy, which was committed on the 23d of *August*, 1806, *Parry* had executed a Warrant of Attorney to the Defendants, with stay of Execution for Six Weeks; upon which he was taken in Execution on the 3d of *October* following, when he paid the Money, which the Assignees had recovered by Action of *Assumpsit*. It was objected, at the Trial before *Le Blanc*, J. that the Plaintiffs had not declared as Assignees of *Parry*, and the Point was reserved.

Topping and *Park* this Day shewed Cause against a Rule to set aside the Verdict, and relied on the Case of *Evans* v. *Mann*, *Cowp.* 569, as decisive of the Question.

Scarlett, in support of the Rule, contended, that in the present Case, the Money having been received by the Defendants, *before* the Commission was opened, differed widely

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THOMAS and Others, Assignees of PARRY, a Bankrupt, *v.* RIDEING and Another.

widely from *Evans v. Mann*, where the Bankrupt had sold the Goods *after* the Commission; and the Distinction is there taken by Lord *Mansfield*.

Wood, Baron. The Way contended for by the Defendants is the usual Way, but I do not think it is absolutely necessary.

The Rule discharged.

1810, *July* 4.

RADMORE AND ANOTHER, Assignees of GOUGH, a Bankrupt, *v.* GOULD.

1 *Wightwick's* Reports, 80.

Defendant allowed to withdraw his Plea, and to replead, after giving Notice of his Intention to dispute the petitioning Creditor's Debt, &c.

DAUNCEY moved, upon an Affidavit of the Defendant's Clerk in Court, that the Defendant might be at Liberty to withdraw his Plea, and to replead, after Notice of his Intention to dispute the petitioning Creditor's Debt, the Trading, and the Act of Bankruptcy. The Affidavit stated, the Deponent's Ignorance of the Necessity of giving such Notice before Delivery of the Plea, and his Information and Belief, that it was essential to the Justice of the Cause, that the Defendant should be at Liberty to dispute the Commission.

Hughes opposed the Motion, upon the Language of the Act *(a)*, which directs, that Notice should be given "at or before Plea pleaded."

Per Curiam. This Motion has been allowed by the Court of *King's Bench*, and the same Practice prevails in Cases of Set-off.

(a) 49 Geo. III. c. 121. s. 10.

CRUTWELL

1810,
Nov. 20.
et seq.

CRUTWELL *v.* LYE.

GEORGE Lye, and *Edward Lye*, were Carriers, and at the Time of their Bankruptcy, were engaged in Two distinct Branches of Trade; one from *Bristol*, through *Bath* to *London*; the other from *Bristol* through *Bath* and *Salisbury* to *Warminster*. Their Assignees put up the whole of their Business to Sale in Two Lots: Lot 1st, described as the Interest and Good-will of the carrying Trade from *Bath* to *London*, was purchased by the Plaintiff for £4000: Lot 2d, described as the Interest in the Trade between *Bristol* and *Warminster*, was purchased by a Person of the Name of *Wansey*, a Nephew of one of the Assignees, at a comparatively trifling Sum; he transferred it to the Bankrupt *Edward Lye*, who, having obtained his Certificate, published Advertisements, and distributed Hand-bills, expressing that he had been *reinstated* in the carrying Business; that his Waggons set off at the *usual Hours* from *Bristol* through *Bath*, *Salisbury*, and *Warminster* to *London*.

The Plaintiffs conceiving that this Extension of the Trade to *London*, was an improper Interference with their Purchase, filed a Bill against the Bankrupt and his Assignees, and made the present Application for an Injunction.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Heald*, in support of the Motion.

The Assignees having sold the Good-will and Interest of the Bankrupt's Trade, does not preclude him from setting it up again, provided he does not hold himself out as carrying on the same Trade, which has been the Subject of Purchase. The Benefits which he derives from his Commission, (as his Certificate, &c.) not being a sufficient Consideration to raise an implied Undertaking, on his Part, that he will not reassume it. If there be an express Covenant or Fraud, the Court will interfere; but publishing Advertisements and Hand-bills, that he is *reinstated* in his Business, and soliciting the old Customers, not a sufficient Ground; an Injunction therefore refused.

How far the Purchasers can be held to their Contract, *Quære*.

This

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CAUTWELL v. LYE.

This Sale is for the Benefit of the Bankrupt; who, deriving a beneficial Interest under his Commission, either by his Certificate, or through his Creditors in respect of the greater Dividend that may be made, and, perhaps, from the Surplus of his Estate, ought not to enter into Competition with the Vendee, under that Commission. *Wansey* purchased this as a Trustee, and with a View that the Bankrupt should carry it on; and the Bankrupt is in point of Fact the Purchaser; it cannot be denied, that the Good-will of a Trade, is an Interest which Assignees can dispose of. The Question is, not whether the Bankrupt can carry on his former Trade, but the Good-will of the old established Concern having been sold; whether he is to continue that old Trade, attracting the old Customers and Connexion, on the Ground of that Continuation; having the Benefit of the Books, and the Facility of knowing who they are, and of soliciting those, whom as far as they could be made the Subject of Purchase, we have bought. This is within the Principle of *Hogg* v. *Kirby (a)*, and *Keene* v. *Harris*. In the Case of *Chandler* v. *Gardiner*, the Legislature had directed, that the Owners of certain free Quays, which it had become necessary to destroy, should receive a Compensation for their Interests in them. The Owner of one of these Quays becoming Bankrupt, the Question was, whether such Compensation belonged to him, or to his Assignees; whether it was to follow the Person or the Property? Your Lordship decided, that it attached on the latter, that it was an Interest bearing a strong Analogy to Good-will, and vested in the Assignees.

Mr. *Richards*, for the Assignees. Sir *Arthur Piggott*, and Mr. *Leach*, for *Lye*.

This is a mere Question of personal Restriction; the

(a) 8 *Ves.* 215.

Assignees

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CRUTWELL v. LYE.

Assignees can sell the Good-will, that the Premises in which the Business has been conducted, have acquired; but they cannot prevent the Bankrupt from again setting up the Trade: what Right have these Plaintiffs to insist, that they have purchased more than the Assignees either intended, or were able to sell, or will the Court give a Construction to these Words contrary to their plain and obvious Sense?

The Cases cited have no Analogy. In *Chandler* v. *Gardiner*, there could be no Doubt that the Compensation was an Interest in the Bankrupt, capable of Disposition; and that either by Operation of Law, or of the actual Assignment, it vested in his Assignees. In *Keene* v. *Harris*, a Widow of a Printer, being a Trustee of the Profits of the *Bath Chronicle*, for her Children, married her Foreman, and with the same Types commenced a Paper under the same Title. This therefore was a clear Breach of Trust. *Hogg* v. *Kirby (a)*, proceeded on the Ground of Piracy.

The Lord CHANCELLOR.

This is a Motion of great Importance, from the Novelty, both in its Circumstances and its Principle; and I was therefore desirous of having the Question fully discussed, on both Sides, at the Bar; and more particularly so, that if the Court did not interfere, the Plaintiff could not have the Benefit of his Purchase; and, on the other Hand, if the Defendant had a Right to exercise this Trade, I might destroy it in a Manner beyond my Power to redress in any subsequent Stage of these Proceedings. It struck me, that the Plaintiff's Right to this Relief, must depend either upon the Covenant or the Conduct of the Bankrupt; and upon the Question whether or not, under colour of his Purchase, he was carrying on the Trade of the Plaintiff:

(a) 8 *Ves.* 215.

now,

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CRUTWELL v. EYE.

now, without entering into the Argument, whether a Bankrupt, under the Circumstances of this Defendant, can enter into a Covenant never again to exercise his Trade, that Covenant not being limited in point of Locality, it is quite clear, if he stand by and suffer a Party to be involved under the Confidence occasioned by his Conduct, the Court would interpose. But I do not see, unless *Wansey* was precluded from purchasing the Trade in which *Eye* is engaged, or unless either he or *Wansey* has purchased it under any restrictive Terms, either express, or to be implied from the Circumstances of the Sale, or the Conduct of the Parties, upon what Ground I can interfere.

The Question then is, am I authorized to say, that the Defendant is carrying on the Plaintiff's Trade; since it cannot be denied, that he cannot carry on his Trade, holding himself out as carrying on what the Plaintiffs, as Purchasers under this Lot, have bought. In the Case of the *Wonderful Magazine* (*a*), the Volume which was the Subject of the Injunction, had been published as the *Sixth* Volume of that Work; thereby affording strong Evidence, that the Defendant was publishing that identical Work; and the Terms of the Injunction were only against publishing, or continuing the Work of the Plaintiff. *Keene* v. *Harris*, and the Case under the *London* Dock Acts (*b*), have not much Relation to this Subject; but suppose an established Firm, *Fisher* and *Wells* for Example; this Court would interpose against others setting up their Trade, and adopting the same Designation of *Fisher* and *Wells*, and thereby holding out a delusive Representation that they were the *Fisher* and *Wells*.

(*a*) *Hogg* v. *Kirby*, 8 *Ves.* 215.

(*b*) His Lordship here stated the Cases of *Keene* v. *Harris*, and *Chandler* v. *Gardiner*, in substance the same as they are given in the Arguments at the Bar.

In

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CRUTWELL, v. LYE.

In this Case, *Lye* having purchased Lot Second, has set up the Waggon Trade, through a different Route, to *London*, and in a Sense the same Trade as that purchased under Lot First, by the Plaintiffs. I also take it to be clear on the Affidavits, that there has been a direct Solicitation to all the Public, and that not merely by Advertisements, but likewise by Distribution of Cards, that the Defendant would carry Goods, between Bristol, Bath, and *London*, though, according to the true Interpretation, by another Road: and it is also so probable on the Affidavits, that direct Solicitation was made to the Customers of the old Concern, that I may take it for granted that that was the Case: and the Question is, whether I can grant an Injunction against the Trade, in the Manner in which it is carried on; nay, I may put it more broadly, if it were carried on in a Road more direct. Travelling by a different Road, *Lye* may in all probability carry Goods, which the Plaintiffs would otherwise have had the Carriage of; yet there are different Places, between the *termini* of their respective Journies, in which the Plaintiffs can have no Concern; and that alone, has presented one of the most difficult Cases to deal with, as far as it respects the Question to what Extent the Injunction ought to go. Suppose the Two Waggons pass through *Hounslow*; the Carriage of Goods thither, would to a certain Extent, be a Prejudice to the Plaintiff; and so on through all the intermediate Stages. The Consideration then is, what Importance is due to the Fact, that these Premises, and the Good-will of this Trade, have been sold under a *Bankruptcy*; whether that will prevent the Bankrupt, having Friends whose Consciences were not affected, from assisting him, from immediately setting up his Trade again? And upon the best Consideration I can give to the Subject, I do not think any of those Interests, which the Bankrupt takes under his Commission, either by the Satisfaction

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CROTWELL v. LYE.

faction of his Creditors, the Effect of his Certificate, or the Surplus, if any, of his Estate, form a Ground on which the Court can say, that the Bankrupt shall not engage in the *like* Trade; I say *like* Trade, though it does not correctly express my Idea, but I mean a Distinction, between the like Trade, and the same Trade, as in the *Wonderful Magazine*. Supposing the Bankrupt therefore to have no other Interests than those which have been stated as flowing from the Commission, this Court has no Jurisdiction to say he shall not; but he happens to become the Purchaser of the *Warminster* Concern; does that Fact afford a Principle, on which I am to say, that in the Absence of any Condition, arising out of the Particulars of this Sale, he shall not extend the *Warminster* Trade to *London;* that he, being at Liberty to use the *Warminster* Trade, or to use any other Trade, shall not be at Liberty to carry between *Warminster* and *London;* the Converse of which would be, that the Plaintiffs would have no Right to go through *Warminster* to *London;* that is a great deal too much. In regard to the Good-will, I can only consider it, as the Value of that probability, that the old Customers will resort to the old Place. If there be any Fraud, that is one Question; but if no other Means be adopted, than to improve the fair Trade, it is going a great Length to say, that he may not: and I am not able, on Reflexion, to find any Case that will authorize me in so doing. From what then am I to infer Fraud? The Bankrupt advertises that he is "*reinstated* in his Busi- "ness;" and though *reinstated* is an Expression tending to Misconception, yet in a fair Sense he is reinstated: and I do not think, taking the whole of the Affidavit, that there is any thing amounting to Fraud.

It is quite a different Question, whether the Plaintiffs are bound to adhere to their Bargain, and whether the Assignees

Assignees have not, by their Activity, taken away the Benefit of their Contract, or the Benefit of the Creditors arising from this Sale; but as the Facts are, I dare not deal with it by Injunction.

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CRUTWELL
v.
LYE.

LINCOLN'S INN HALL.
1811,
Aug. 1.

Ex parte HARRIS AND ANOTHER.—In the Matter of RAMSEY AND ALDRICH.

Proof by Assignees under a joint Commission, against the separate Estate of one Partner, for Money taken out without Privity of the other.

THIS was the Petition of *Harris* and Another, Assignees of the Bankrupts, and it prayed, that they might be at Liberty to prove the Sum of £1182: 12*s.*: 6*d.* against the separate Estate of *Aldrich*, as having been applied by him to his own private Use, without the Knowledge and Consent of *Ramsey*.

They were Partners as Upholders, but *Ramsey* was also in a distinct Business on his separate Account.

Sir *Samuel Romilly*, and Mr. *Montague*, in support of the Petition.

Mr. *Cullen*, *contra*.

The Lord CHANCELLOR.

Let there be an Enquiry before the Commissioners, whether the Money was so applied without the Knowledge, Privity, and Approbation of *Ramsey*; and if so, declare that the Petitioners are entitled to prove *(a)*.

(a) Vide Ex parte Assignees of *Lodge* and *Fendal*, 1 *Ves.* jun. 166.

Ex

LINCOLN'S INN HALL. 1811, *Aug.* 19.

Ex parte CARSTAIRS AND OTHERS.—In the Matter of LEE.

A. becomes bound as Surety with *B.* in a *Respondentia* Bond, upon a Ship bound to the *East Indies*, conditioned to be void upon Payment, within Thirty Days after Arrival in the River *Thames*, or at the End of Thirty-six Calendar Months, or upon an utter Loss.

B. assigns all his Goods on board the Ship to *A.* upon Trust, in the first Place to pay a Debt owing from himself to *A.* and in the next Place to pay off all the Debts for which he had become Surety on the *Respondentia* Bond.

THIS Petition stated, that by several Bonds entered into by one *James Robert Oliver* and the Bankrupt, they jointly and separately became bound to the Petitioners in the several Sums of Money mentioned in the Petition. The Bonds recited that the Obligees had advanced to *James Robert Oliver*, certain Sums of Money at *Respondentia*, upon the Goods, Merchandize, and Effects, laden and to be laden on board the Ship or Vessel, called *The Marquis of Ely*, then outward-bound for *China*; that *Stephen Lee* had agreed to become Surety for *James Robert Oliver*, for the due Performance of the Condition of the Obligation; the Condition was, that if the said Ship did with all convenient Speed, proceed and sail on her Voyage, and return at or before the End and Expiration of Thirty-six Calendar Months, and if *James Robert Oliver*, and *Stephen Lee*, or either of them, within Thirty Days next after the said Ship or Vessel should arrive at her Moorings in the River *Thames*, from her said intended Voyage, or at the End of the said Thirty-six Calendar Months, which of the said Times should next happen, well and truly pay, or cause to be paid unto Petitioners, the respective Sums advanced by them, together with certain other Sums *per* Calendar Month, and proportionably for a lesser Time than a

Before the Time specified in the Bond *A.* becomes Bankrupt; the Assignees receive a Sum of Money on Account of the Proceeds of the Goods; it was ordered, that after deducting the Amount of *A.*'s private Debt, the Residue of the Proceeds, and all future Receipts, should be divided among the *Respondentia* Creditors only.

Calendar

1811.

Ex parte CARSTAIRS and Others.—In the Matter of LEE.

Calendar Month for all such Time, and so many Calendar Months as should be elapsed, and run out of the Thirty-six Calendar Months, over and above Fourteen Months, or if in the said Voyage, and within the said Thirty-six Months, an utter Loss of the Ship should unavoidably happen, and *James Robert Oliver*, and *Stephen Lee*, or either of them, did, within Six Months next after such Loss happening, well and truly account for, and pay to the Petitioners a just and proportionable Salvage on all the Goods, Merchandize, and Effects, of *James Robert Oliver*, on board the said Ship, then the said Obligation to be void.

By an Indenture, bearing Date the 11th of *August*, 1809, made between *James Robert Oliver* of the one Part, and *Stephen Lee* of the other Part, reciting that *James Robert Oliver* was the Owner of certain Goods and Merchandizes on board *The Marquis of Ely*, and that the said *James Robert Oliver* was indebted unto the said *Stephen Lee* in the Sum of £351:6*s*:2*d*., and that the said *Stephen Lee*, at the Request of the said *James Robert Oliver*, had become Surety for him, for the Payment of sundry Sums of Money taken up by the said *James Robert Oliver*, at *Respondentia* or other Interest, it was witnessed, that as well for securing the Re-payment of the said Debt, as for making Provision for the due Payment of all Principal Monies and Interest, for which the said *Stephen Lee* had become Surety for the said *James Robert Oliver* as aforesaid, he, the said *James Robert Oliver*, did grant, bargain, sell, and assign, unto *Stephen Lee*, all and every the Goods and Merchandize whatsoever, of him the said *James Robert Oliver*, shipped on board the said *Marquis of Ely*, East Indiaman, and all Benefit and Advantage thereof, and all and every the Proceeds of Sale thereof, and of every Part thereof, and also all and every the Goods, Merchandizes, and Effects, which

1811.
Ex parte CARSTAIRS and Others.—In the Matter of LEE,

should or might be purchased in *India*, or elsewhere, with the Proceeds of the Sale of the said Goods and Merchandizes so put on board the said Ship *The Marquis of Ely* as aforesaid, upon Trust to convert the same into Money, at such Time or Times as to him or them should seem meet, and thereout, after deducting and retaining all the reasonable Costs and Charges relating thereto, to re-pay to himself, or themselves, the said Sum of £341:6*s*:2*d*. then due and owing from the said *James Robert Oliver*, to the said *Stephen Lee* as aforesaid, with lawful Interest for the same, and in the next Place, to pay off and discharge all and every the Debts and Sums of Money due and owing from the said *James Robert Oliver*, to any Person or Persons for the Payment, whereof the said *Stephen Lee* had become a Security as aforesaid, with all *Respondentia* and other Interest due thereon, and to pay the Surplus thereof, if any, unto the said *James Robert Oliver*, his Executors, Administrators, and Assigns.

The Marquis of Ely sailed on her intended Voyage, and arrived at her Port of Destination in safety, with the Goods on board.

On the 17th *September*, 1810, a Commission issued against *Lee*, and Two of the Petitioners were chosen his Assignees. At the Time of his becoming Bankrupt, *Lee* was indebted to the Petitioners, in the Sum of £6451:2*s*:1*d*. on the said *Respondentia* Bonds, and they had severally proved their Debts under the Commission; the Assignees had received on Account of the Proceeds of the Sale of the said Goods, the Sum of £795:8*s*:4*d*. but the Commissioners had ordered a Dividend of all the Effects of the Bankrupt, including the said Sum of £795:8*s*:4*d*. among all the Creditors.

The Petition therefore prayed, that the Order for a Dividend under the said Bankrupt's Estate might be stayed,

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Ex parte CARSTAIRS and Others.—In the Matter of LEE.

stayed, and that his Lordship would direct the Assignees to pay to the Petitioners and the rest of the *Respondentia* Bond Creditors, who had proved, or might hereafter prove their Debts under the said Commission, the said Sum of £795: 8*s*: 4*d*. after deducting therefrom the said Sum of £341: 6*s*: 2*d*. and Interest, rateably and in Proportion to their respective Debts, and also such further or other Sum or Sums of Money as they might from time to time receive from the Proceeds of the said Goods.

This came on by Consent for the Opinion of the *Lord Chancellor*.

Sir *Samuel Romilly*, in support of the Petition.

Mr. *Hart*, and Mr. *Cullen*, for the general Creditors.

The Lord CHANCELLOR

Directed Notice to be given to *Oliver*, and made the Order according to the Prayer of the Petition.

LINCOLN'S INN HALL. 1811, *Aug*. 12.

An Assignee having purchased Goods at a Sale, under the Commission, becomes Bankrupt. Ordered, that such of the Goods as remained in Specie should be re-delivered, and that what he had re-sold should be proved as a Debt.

Ex parte SPONG, AND ANOTHER.—In the Matter of BALL.

ON 10th *April*, 1811, a Commission issued against *Ball*, under which the Petitioners and one *Southwold* had been chosen Assignees. *Southwold*, at the Sale, bought some of *Ball*'s Effects, Part of which he had re-sold, and Part were now remaining in Specie. He had since become a Bankrupt, and his Certificate was

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Ex parte SPONG, and Another.— In the Matter of BALL.

lying before the *Lord Chancellor* for Allowance; the Petition prayed a Reference to the Commissioners, to take an Account of the Effects of *Ball*, in the Hands of *Southwold*, at the Time of his Bankruptcy, and that his Certificate might be stayed.

Mr. *Montagu*, for the Petition.

Sir *Samuel Romilly*, *contra*.

The Lord CHANCELLOR.

The Goods remaining in Specie must be delivered, what he has re-sold is a Debt proveable under his Commission, it is not worth a Reference to the Commissioners; the Solicitors on either Side can easily settle the Amount. Let the Certificate go.

LINCOLN'S INN HALL.

1811, *Aug.* 13.
1812, *Jan.* 10.

Ex parte BULLEN.—In the Matter of BARKER.

Lien on the Proceedings; Assignees, or Solicitor, under the Commission, not permitted to say that they are in any Persons Hands but their own.

A first Commission to render void a second, must be a Commission in legal Operation.

THIS was the Petition of the Assignees of a Bankrupt, against whom a former Commission had issued, and under which he had not obtained his Certificate; and it prayed, that one *Davis*, a Solicitor, who had in his Custody the Proceedings under the first Commission, might be directed to permit the Petitioners to inspect the same, or to give them the Names and Places of Abode of the Creditors, who had proved under it, in order that they might make some Arrangement with them.

The Petitioners, previously to preferring the present Petition, had made an Application for that Purpose to *Davis*, who had declared his Intention not to comply

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Ex parte BULLEN.— In the Matter of BARKER.

ply with it, till his Bill of Costs for preparing a Trust Deed, with a View to a Composition under the first Commission, and which most of the Creditors had accepted, should be settled. In Answer to the present Petition, he stated that he was not the Solicitor to that Commission, but had been entrusted with the Proceedings by the Persons who were.

Sir *Samuel Romilly*, and Mr. *Roupell*, in support of the Petition.

Mr. *Hart*, for *Davis*.

Mr. *Heald*, for the Assignees under the first Commission.

The Lord CHANCELLOR,

After stating the Time which had elapsed between the Two Tradings, and the Difficulty in Dealing between the Two Commissions, said, that in order to forward any Arrangement for that Purpose, and for the Purposes of Justice, he would not suffer the Assignees, or the Solicitor to the Commission, to say, that the Proceedings were in any other Hands than their own, and ordered, that the Proceedings should be put back into the Hands of *Webb*, the Assignee under the first Commission, who should permit the Petitioners to inspect them, without Prejudice to *Davis's* Lien on any other Papers; and ordered, that in the mean Time, a Sugar House at *Liverpool*, Part of the Bankrupt's Property, should not be sold *(a)*.

Upon

(a) Barker, the Bankrupt, after the first Commission, had entered into some Arrangement with his Creditors to pay them a Composition of Three Shillings and Four-pence, and to supersede that Commission. Some of them had acceded

1811.
Ex parte BULLEN.— In the Matter of BARKER. 1812, *Jan.* 10.

Upon this Petition's coming on again, Mr. *Hart*, for *Davis*, insisted, that he did not claim a Lien on the Proceedings against the first Assignees wishing to work their Commission, but against the Bankrupt, on a Bill of Costs, for a Composition, upon the Ground of which Composition, the Assignees under the second Commission made this Application; and that although the first Assignees, might have demanded the Proceedings from him, the Bankrupt himself never could.

Mr. *Heald*, for the Assignee under the first Commission, applied for his Costs.

Mr. *Montagu*, for *Parkin*, a Creditor for £200, under the first Commission, who had not come in under the Composition, claimed to be paid the full Amount of his Debt, and his Costs.

The Lord CHANCELLOR.

A second Commission, while a first is subsisting, is, strictly speaking, void; but such Commission can only be set up against a subsequent one, when it is in legal Operation; if the Parties under the first, have by Contract placed themselves in a different Situation, I will not suffer them to defeat the fair Claim of Creditors under another.

It was ordered, that *Davis* should be paid his Bill of Costs and Advances for the Composition, but that neither

acceded to this; it was with a View to proceed upon this that the present Petitioners wished to inspect the Proceedings; and it was, as having been employed about this, that *Davis*'s Demand accrued. *Barker*, at the Time of the present Bankruptcy, was a Sugar Baker at *Liverpool*, and was in Possession of a Sugar-house, which the Order directed should not be sold.

he

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Ex parte BULLEN.—In the Matter of BARKER.

he nor the Assignee under the first Commission, who had taken the Composition, should have their Costs of the Petition. *Parkin* to be paid his Debt and Costs; the first Commission to be superseded.

Ex parte WILSON.

MR. *Hodsol*, as the Executor of a Surety for the Bankrupt, had paid the Debt, and had under the late Act *(a)*, applied to prove it under the Commission; the Commissioners at *Durham* had admitted the Proof of the Debt, and also of the subsequent Interest, which it was the Object of the present Petition to expunge.

Mr. *Bell*, for the Petition.

The Lord CHANCELLOR.

All that is meant by the Act is, that the Surety should prove as the principal Creditor, but nothing subsequent to the Bankruptcy.

Ordered as prayed.

(a) 49 *Geo.* III. c. 121. s. 8.

Ex

LINCOLN'S INN HALL. *Aug.* 1811.

A Person dealing with another for a Composition, shall not be bound by a Concealment, or Representation of the Amount of his Debt, if the Plan, under which the Concealment or Representation takes place, is not carried into Effect.

Ex parte OAKLEY.—In the Matter of ROOKE.

THIS Petition stated that several Years previous to the Year 1800, *Benjamin Rooke*, the Father of the Bankrupt, purchased the Lease of a Farm at *Bengeo*, in the County of *Hertford*; and in or about the Year 1800, the Bankrupt married, went to reside on the Farm, and there carried on the Business of a Farmer and Grazier: upon that Occasion *Benjamin Rooke* made over, or agreed to make over the Lease to his Son. The Petitioner, who was a Dealer in Sheep, had occasionally supplied the Bankrupt with Sheep, and for that and on other Accounts was a Creditor to the Amount of about £2700, and in *December*, 1809, pressing for Payment, he, the Bankrupt, and *Benjamin Rooke*, held a Meeting, for the Purpose of coming to some Arrangement. On that Occasion, *Benjamin Rooke* and the Bankrupt offered to join in certain Bonds for securing the Petitioner's Debt; and a Statement was produced by them, by which it appeared, that the Bankrupt was indebted to various Persons in the Sum of £800, but the Name of *Benjamin Rooke*, did not appear among such Creditors, nor did he, although he examined such Statement, assert that any Thing was due to him.

This Plan of Payment by the joint Bonds was shortly after abandoned; and at another Meeting for the same Purpose, *Benjamin Rooke* drew out a Sketch or Plan for liquidating the Petitioner's Debts by Instalments; in such Plan he again stated the Debts as before, and inserted the Lease as the Property of the Bankrupt, at a Valuation of £1000; that Plan was objected to by the Bankrupt, but it was at length agreed, that a Bill of Sale

Sale of the Stock and Effects upon the Farm should be executed to the Petitioner, which was accordingly done; under that Bill of Sale the Petitioner took Possession in *March* last, and continued therein till the Commission issued.

The Petitioner's Title to the Stock and Effects being affected by the Bankruptcy, he gave up Possession to the Messenger, and proved his Debt under the Commission, under which also *Benjamin Rooke* proved a Debt for £3000, for Money alleged to have been advanced to his Son, but which Debt the Petition stated to be unfounded; *Benjamin Rooke* had also got the Lease into his Possession, claimed it as his own, and refused to give it up.

The Petition prayed, that the Debt of £3000, proved by *Benjamin Rooke*, might be expunged; and in case it should appear, that he had received any Dividend on the said Proof, that he might be ordered to re-pay the same to the Assignees for the Benefit of the Bankrupt's Estate, and that he might also be ordered to produce and deliver up to the Assignees, the original Indenture of Lease of the Farm, and all other Title-Deeds relating to the same, in order that the Premises might be sold for the Benefit of the Bankrupt's Estate; and that in case he had sold the same, he might be directed to pay the Consideration to the Assignees for the same Purpose.

There was an Affidavit by *Benjamin Rooke*, denying that he had ever agreed to make the Farm over to his Son; that upon his Son's Marriage he gave him up the Possession and Occupation of the Farm, but not the beneficial Interest in the Lease: he insisted upon his Debt of £3000, but admitted, that at the Meetings with *Oakley*, he had concealed it: but that Concealment arose from the Circumstance of the Meetings taking place,

1811.
Ex parte OAKLEY.—In the Matter of ROOKE.

place, to form an Arrangement for *Oakley's* Satisfaction only; he stated his Belief, however, that *Oakley* was in fact acquainted with the Existence of the Debt, the same having been previously mentioned to him by the Deponent.

Sir *Samuel Romilly*, and Mr. *Wetherell*, for the Petition.

Mr. *Richards*, and Mr. *Montagu*, for *Benjamin Rooke*, insisted, that this was distinguishable from the Cases on this Head; here the Debt was suppressed, because the Meeting was for the Purpose of making an Arrangement with *Oakley* only.

Mr. *Cooke*, for the Assignees.

Sir *Samuel Romilly*, in Reply, admitted, that the Question was not, whether the Debt should be expunged, and the Lease given up, as between *Rooke* and the *general Creditors*; but whether he was entitled to them, as against the Petitioner.

The Lord CHANCELLOR.

It is clear, from the Case of *Montefiori* and *Montefiori(a)*, and from many subsequent Decisions, that a Person dealing with another, and holding out that he is no Creditor, shall be bound by that Representation; and if in this Case the first Plan had been adopted, or if the second Plan had been adopted, the Father never could have entered into Competition with this particular Creditor. But in all the Cases upon this Head, something has been done: here both the original Plans entirely failed; the Bill of Sale was adopted, and under that he took the

(a) 1 *Black.* Reports, 363. *Ex parte Gardner*, 11 *Ves.* 40. *Ex parte Campbell*, 16 *Ves.* 244.

Sheep,

Sheep, and the Stock on the Farm. This Petition must be dismissed, but it is impossible to give Costs: the Assignees must have their Costs out of the Estate.

1811.
Ex parte OAKLEY.—
In the Matter of ROOKE.

Ex parte BRENSLEY.
Ex parte LANCASHIRE, &c.

LINCOLN'S INN HALL.
1811,
Aug. 15.

THESE were several Petitions, to supersede Commissions, on the Ground of there being no petitioning Creditor's Debt.

Sir *Samuel Romilly*, for the Petitioners.

Mr. *Hart*, *contra*.

The Lord CHANCELLOR

Directed an Enquiry before the Commissioners; if they found a Debt, the Commission was to proceed; if no Debt, the Commissions to be superseded; unless an Application should be made within a Fortnight, after the Commissioners should have certified.

Ex parte SAWYER.

1810,
Aug. 16.

THIS was an Application to stay a Certificate on the Ground, that Alterations had been made in it, and the Stamp thereby vitiated.

Sir *Samuel Romilly*, and Mr. *Hart*, for the Petitioner.

Mr.

1810.
Ex parte SAWYER.

Mr. *Agar*, *contra*, all that the Act requires is a Stamp upon a *Certificate*; but till allowed by your Lordship, the Instrument is not a Certificate.

The Lord CHANCELLOR.

I apprehend you are Right. I will look into the Stamp Act; but I think it is no Objection.

The Certificate was allowed *(a)*.

(a) As to the Certificate being signed, but not allowed, it operates as nothing. I remember a Case where a Lottery Ticket was given to the Bankrupt by a Creditor who had signed his Certificate, as a Mark of Approbation of his Conduct, but having been drawn a Prize before the actual Allowance of the Certificate, it was claimed and shared by the Creditors at large.—*Per* Lord *Kenyon*, *Webb* v. *Ward*, 7 T. R. 296.

Aug. 16.

Ex parte THE BANK OF ENGLAND.—In the Matter of BOWLES.

Bank of *England* admitted to prove by their Clerk without a Power of Attorney.

THIS was a Petition, that the Governor and Company of the Bank of *England* might be at liberty to prove a Debt by their Clerk, who is generally employed for that Purpose, without his having a Power of Attorney; and that the Commissioners who had refused to admit him might pay the Costs.

The Lord CHANCELLOR

Made the Order, observing that there was no Ground whatever, that the Commissioners should pay Costs, and that

nat to prevent any future Inconvenience, he should make General Order *(a)*.

1810.

Ex parte The BANK of ENGLAND.—In the Matter of BOWLES.

(a) Ex Relatione.—Corporations usually appoint a Clerk or Treasurer, who is he Person to prove their Debts; he must, however, produce his Appointment under Seal to the Commissioners. *Vide Co.* B. L. 127.

Ex parte ARUNDEL.—In the Matter of WHITE.

UNDER a Commission issued against *White* in 1810, the Petitioner had attempted to prove a Debt of £2200; his Proof had been rejected on a Suggestion by he Bankrupt, that the Debt was not due from his Estate, ut from one *George Ross*. The Petitioner then brought n Action against *White*, in which he obtained a Verdict, ntered up Judgment, and had taken out a *Capias ad Satisfaciendum* merely as a preliminary Step to proceeding gainst the Bail. The Bankrupt thereupon surrendered imself in discharge of his Bail, but the Petitioner never harged him in Execution, and did not intend so to do.

The Proof of the Petitioner's Debt having been refused under the Commission, and he brings an Action against the Bankrupt, obtains a Verdict, enters up Judgment, and takes out a *Capias ad Satisficiendum*, in order to fix the Bail. The Bankrupt surrenders himself in discharge of them. The Petitioner admitted to prove his Debt, and the Certificate stayed.

The Petitioner prayed, that he might be at liberty to all a Meeting for the Purpose of proving his Debt, and nat the Certificate might in the mean Time be stayed.

The Petition stated that there had been no Meeting ince the Verdict, and no Dividend, and that having been efused a List of Debts, he did not know whether his Proof would turn the Certificate or not *(a)*.

(a) Upon Reference to the Proceedings, it appeared that his Debt would turn the Certificate.

Mr.

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Ex parte ARUNDEL.—In the Matter of WHITE.

Mr. *Richards*, and Mr. *Montagu*, for the Petition, cited *Ex parte Cundall*, 6 *Ves.* 446.

Sir *Samuel Romilly*, and Mr. *Hart*, *contra*, relied on the 49 *Geo.* III. c. 121. s. 14.

Mr. *Cooke*, for the Assignees.

The Lord CHANCELLOR.

Go before Commissioners, with liberty to prove, and in the mean Time stay the Certificate.

Ex parte BRAY, AND ANOTHER.—In the Matter of LEE.

The Act is imperative, that an Assignee shall be charged £20 *per Cent.* for Money wilfully retained in his Hands.

THIS was the Petition of *Benjamin Bray* and *William Walton*, two of Assignees of the Bankrupt; it prayed that *John Lambert*, the other Assignee, might repay the Sum of £346:4*s*:3*d*., with £20 *per Cent.* Interest, from the Time it had remained in his Hands.

The Bankrupt carried on Business at *Bishop Wearmouth*; and *Lambert*, who was resident in *London*, at the particular Desire of the other Creditors in *London*, and for their Security and Satisfaction, went to *Bishop Wearmouth*, to attend the Choice of Assignees, and to be himself elected an Assignee.

He was accordingly elected, and an Order was signed by the major Part of the Creditors present at that Meeting, that all Monies should be paid into a Bank appointed by them.

On

1810.

Ex parte BRAY, and Another.— In the Matter of LEE.

On the 13th *March*, 1810, he received £346:4*s*:3*d*. which, apprehensive of the Solvency of the Bank, he retained to the 30th *June*, but he claimed the Sum of £42:8*s*:5*d*. for his Expences from *London* to *Bishop Wearmouth*.

Mr. *Leach*, in support of the Petition.

Mr. *Hart*, for the Assignees.

The Lord CHANCELLOR.

Though it is impossible in this Case to say that Mr. *Lambert* has not acted meritoriously, and with the best Intentions, yet as it appears that he has wilfully retained this Sum in his Hands, the Act is imperative, and he must pay £20 *per Cent*. As to the Sum of £42:8*s*:5*d*. however proper it may be for the Creditors to allow it, yet I have no Discretion.

Ex parte BROCKHURST.

THIS was a Petition by the Assignees, that the Representative of a Person who had been Solicitor to the Commission, might deliver up the Proceedings; the Petitioners offering to pay the Costs, deducting those of a Bargain and Sale which had been rendered useless by his Negligence.

Mr. *Roupell*, for the Petition.

Sir *Samuel Romilly* stated, that there was a fatal Objection to the present Petition, *viz*. that the Affidavit in support

Petition, the Affidavit in support of which, had been sworn before a Master Extraordinary, who was Solicitor to the Commission; ordered to stand over, with Liberty to file another Affidavit.

1810.

Ex parte BROCKHURST.

support of it had been sworn before a Master Extraordinary, who was the present Solicitor to the Commission.

The Lord CHANCELLOR

Allowed the Petition to stand over, with Liberty to file another Affidavit; and that the Petitioners should take the Commission and the Proceedings, without prejudice to the Question of Costs.

Ex parte HESHAM, AND ANOTHER.

Where one Partner carries on a distinct Trade, the other Partner may, under his Commission, prove a Debt for Goods sold to him by the Firm.

THE Petitioners were the Partners of the Bankrupt, who carried on a distinct Trade, in which he had purchased Goods of his Firm. The Mode of settling the Accounts was, that an annual Balance was struck, and the Amount of Goods sold carried to his private Debt. This was a Petition for Liberty to prove their Debt under his Commission, which had been rejected by the Commissioners.

Mr. *Bell*, in support of the Petition, cited *Ex parte St. Barb*, 11 *Vesey*, 413.

Mr. *Hart*, *contra*.

The Lord CHANCELLOR.

The Case is no more than this; one sole Trader buys Articles of himself and Partners, you must surely prove for that, however it may be arranged in Account afterwards. It is quite different from the common Case of a Partner not carrying on a distinct Trade, borrowing Money.

Ex

LINCOLN'S INN HALL.
1811,
August.

Ex parte SMITH.

Though a Commission of Bankrupt is a Matter of Right, yet where it has been taken out under Circumstances of Oppression, the Court will examine into it strictly; and if there should be no sufficient Act of Bankruptcy on the Proceedings, will not sustain it by directing an Enquiry as to any other Act.

THIS was a Petition for a Supersedeas, and an Assignment of the Bond, on the Ground of there being no Act of Bankruptcy; it stated, that exclusive of the petitioning Creditor's Debt, which was on the Balance of a running Account, the Petitioner's Debts did not exceed £60, and his Effects were £700.

Mr. *Hazlewood*, in support of the Petition, cited *Ex parte Bowes*, 4 *Ves.* 168.

Sir *Samuel Romilly*, and Mr. *Roupell*, *contra*.

The Lord CHANCELLOR.

This is a Petition to supersede a Commission, because no Act of Bankruptcy has been proved; and although I admit, where there is a petitioning Creditor's Debt, a Trading, and an Act of Bankruptcy, however reprehensible it may be in a Creditor by this Proceeding to oppress and crush his Debtor, that the Process is a Matter of Right; yet I do think, in a Case of this Kind, it is the Duty of the Court critically to examine whether that Process can be sustained.

In this Case it appears, on an Examination before the Commissioners, that this Bankrupt's Property is £700 and upwards; and his Debts, exclusive of the petitioning Creditor's, only £60. In a Commission taken out under such Circumstances, the petitioning Creditor is bound to shew, that there is sufficient Evidence to support it, and as on the Proceedings there is not sufficient Evidence, it is not

1811.

Ex parte SMITH.

a Case, in which I am to strain to find other Pro to place it in a better Condition, by directing an E as to another Act of Bankruptcy; and I disavo judicial Inclination so to do.

This Commission therefore must be supersede with Costs. I will not assign the Bond, because yc have a more advantageous Remedy in your Action Case *(a)*.

(a) Smith v. *Gainsford.*

This was an Action of Trespass, *de bonis asportatis*, brought by *Smith*, the Petitioner in the above Petition, against *Gainsford*, the petitioning Creditor, the Solicitor, and the Messenger under the Commission. The Messenger suffered Judgment to go by Default. The Action was tried at the *Kingston* Lent Assizes, 1812, *Coram*, *Macdonald*, C. B. The Plaintiff gave in evidence, the taking Possession by the Messenger, sent in by the Solicitor. A Direction by *Gainsford* to the Auctioneer to sell; a consequent Sale; and the Writ of Supersedeas.—*Macdonald*, C. B. d the Jury to give the of the Goods against titioning Creditor, wit they thought a fair C sation, for the Inter the Plaintiff had suf his Business: but tha was no satisfactory G for a Verdict against licitor, who was pro ally bound to act as done.

The Jury found ingly.

Best, Serjeant, an *land*, for the Plaintiff.

Shepherd, Serjeant *row*, and *Rose*, for t fendants.

LINCOLN'S INN HALL. 1811, *August.*

Proof upon an Award made after the Act of Bankruptcy expunged, and an Account directed before the Commissioners.

Ex parte KEMSHEAD.—In the Matter of COTTRELL.

A PERSON of the Name of *Newton*, and the Bankrupt, had been in Partnership together, and dissolved it on the 12th of *May*, 1809. Having Disputes about the Settlement of their Accounts, they, on the 19th of *September*, 1810, referred them to the Arbitration of one *Orrell*, who, on the 25th of *January*, 1811, made his Award in favor of *Newton*, for the Sum of £715. On the 22d of *March*, 1811, the Commission issued against *Cottrell*, on an Act of Bankruptcy, on the 12th of *April*, 1810.

Newton had been admitted to prove for the Amount of the Sum given by the Award. The Proof had been resisted before the Commissioners, on the Ground that only £190 was due; but the Commissioners considered the Award as conclusive.

The Petition prayed an Enquiry before the Commissioners, and that the Debt might be expunged.

Sir *Samuel Romilly*, in support of the Petition.

Mr. *Hart*, *contra*.

The Lord CHANCELLOR

Made the Order, according to the Prayer of the Petition.

1810.

Ex parte HAGUE, AND COLE.—In the Matter of DOYLE.

A Petition to supersede a Commission before the Adjudication of Bankruptcy is premature.

Though the Act must be committed in this Country, yet a Letter from a Trader who has gone Abroad in the Course of his Trade, connected with Circumstances here, may be sufficient Evidence of such Act.

THIS was a Petition to supersede a Commission taken out against *Doyle*, at the Expence of the petitioning Creditor.

In *February*, 1810, *Doyle* went to *Gottenburgh* with Goods for Sale; on the 11th of *September*, 1810, he sent a Letter to his Correspondents in *London*, stating, that not being able to sell the Goods, he could not come Home and Leave them, more particularly as he was unable to meet his Engagements, and requesting them to endeavour to get his Acceptances renewed.

The Commission had issued, but no Meeting of the Commissioners had taken place.

Sir *Samuel Romilly*, and Mr. *Montagu*, for the Petitioners, insisted, that an Act of Bankruptcy must be committed in *England*; and that the Letter was no Evidence of such Act. *Inglis* v. *Grant*, 5 T. R. 530 *(a)*.

Mr. *Cooke*, *contra*, resisted the Petition, on the Ground that it being within the Commissioners Jurisdiction to say, whether an Act of Bankruptcy or not, and they not having given any Decision, the Petition must be dismissed as premature.

(a) Norden v. *James*, *Dick.* Rep. 583. *Alexander* v. *Vaughan*, 1 *Cowp.* 401.

The

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Ex parte HAGUE, and COLE.— In the Matter of DOYLE.

The Lord CHANCELLOR.

When I read this Letter it did not appear to me to be sufficient Evidence of an Act of Bankruptcy, though connected with other Circumstances it may be. Let this Petition stand over till after the Commissioners have decided; if this were to be admitted, a similar Petition might be presented in every Commission to prevent a Man's being declared a Bankrupt by the Commissioners *(a)*.

(a) In *Ex parte Stokes*, 7 *Ves.* 405, the *Lord Chancellor* refused to supersede a Commission, previously to the finding of the Commissioners, or to direct an Issue to try the Validity of it; although the Petition for that Purpose was supported by an Affidavit of the Bankrupt's being worth £3000, after all his Debts were paid; that he did not owe the petitioning Creditor £100; and had not committed an Act of Bankruptcy.

Ex parte BROWNE.—In the Matter of BROWNE.

BY Articles of Partnership, *John Browne*, and *John Leonard Browne*, were to carry on Business together for Twenty-one Years; if one should die during that Time, the Executor of the other was to be admitted in his Stead. *John Browne* died, leaving a Widow his Executrix, who for some little Time carried on the Business with the Survivor: Applications had been made to her to relinquish her Interest in the Business for an Annuity; but on the 2d of *May*, the Negotiation went off,

Although there be a Trading, a Debt, and an Act of Bankruptcy; yet, if the Commission be taken out for a Purpose foreign from its Object, as to work a Dissolution of a Partnership, it is supersedeable at the Costs of those who take it out.

Mrs.

1810.

Ex parte BROWNE.— In the Matter of BROWNE.

Mrs. *Browne* not thinking the Offer satisfactory. On th 7th of *May*, *John Browne* committed an Act of Bank ruptcy, and a Commission issued, under which he wa declared a Bankrupt.

The present Petition was by the Widow for a Super sedeas, on the Ground that the Commission had bee taken out merely with a View to defeat her Interest in th Partnership; it alleged that the Bankrupt was perfectl Solvent. The Bankrupt's Interest in the Trade had unde the Commission been, by Direction of the petitionin Creditor, and a few others who constituted the Majorit in Value, sold to the Father of the Bankrupt, who ha before been in treaty with the Petitioner's for her Interes in it, and was then carried on in the Name of *Browne* The petitioning Creditor had been active in promoting Dissolution of the Partnership previous to the Bankruptcy

Sir *Samuel Romilly*, and Mr. *Cullen*, in support o the Petition.

Mr. *Hart*, *contra*, contended, that there being a Debt a Trading, and an Act of Bankruptcy, it constituted good Commission; and the Court would not scrutiniz the Motives for having taken it out: the petitioning Cre ditor's Affidavit denies his having concerted an Act wit any Person whatever.

The Lord CHANCELLOR.

I can never agree that a Man shall take out a Commis sion, not as a Commission, but as the Means to carr into effect an Intention that has nothing on Earth to d with it. I have no Doubt this Commission was merely th Means to exclude the Petitioner from her Right under th Articles of Partnership: let it therefore be superseded at th Costs of those who have been served with the Petition.

E.

1810.

Ex parte SARGEANT.—In the Matter of BURROUGH.

THE Bankrupt was a Banker at *Salisbury*, and at the Time of his Bankruptcy had a considerable Balance in the Hands of Messrs. *Kensington* and Co. his Agents in *London*. Shortly before the Bankruptcy, the Petitioner paid Two Bills, which did not fall due till after the Bankruptcy, into the Bank of the Bankrupt; he remitted them to Messrs. *Kensington* and Co., in whose Hands they remained at the Time of the Bankruptcy. The Petitioner had employed the Bankrupt as his Banker for several Years, and he had been in the Habit of paying Bills and Cash indiscriminately into his Bank, which were entered without Distinction in a general running Account; the Petitioner had occasionally, though rarely, over-drawn this general Account.

The Proceeds of short Bills ordered to be returned, unless upon an Enquiry it should appear, that with the Knowledge of the Party depositing them, or from the Habits of dealing between the Parties, they were to be considered as Cash. The onus of that Proof lies on the Banker.

The Petitioner, upon the Bankruptcy of *Burrough*, applied to Messrs. *Kensington* and Co. to deliver him up the Bills which were still remaining undue; they refused, and received the Amount from the Acceptors, which, together with the general Balance upon *Burrough*'s Account, they paid over to his Assignees. The Petitioner prayed that he might be paid the full Amount of his Bills out of that Balance, or out of the Bankrupt's Estate.

Mr. *Richards*, and Mr. *D. Jones*, in support of the Petition, relied upon *Giles* v. *Parkins*, 9 *East*. R. 12.

Mr. *Heald*, and Mr. *Wray*, for the Assignees, opposed the Claim, upon the Ground that the Bills and Cash being

1810.

Ex parte SARGEANT.— In the Matter of BURROUGH.

being indiscriminately carried to one general Account, the Property was therefore devested, and the Petitioner only entitled to his Dividend.

The Lord CHANCELLOR.

It is quite clear that short Bills in the Possession of Bankers, are to be considered as still remaining in the Possession of the Parties by their Agents, to be specifically returned; and if these Bills were written short, the Petitioner could have compelled *Kensington* and Co. so to settle with *Burroughs*, as not to break in upon his Claim. That they were not written short amounts to nothing, unless there be a Concurrence manifested at the Time, or to be inferred from the Habits of dealing between the Parties, that they were to be considered as Cash; if they were there, with the Petitioner's Knowledge as Cash, and he drawing, or entitled to draw upon them as having that Credit in Cash, he would thereby be precluded from recurring to them specifically: but it is upon them to prove that to be the Case, and the Petitioner is therefore entitled, unless they have been carried to his Credit as Cash, with his Knowledge or Consent.

Take an Enquiry before the Commissioners, and declare the Petitioner entitled to the Proceeds of the Bills, unless by his Consent, or from the Habit of dealing between the Parties, they can be considered as Cash *(a)*.

(a) Vide Ex parte the *Hull*, and other Banks. In the Matter of *Boldero*. *Post*.

Ex

1810.

Ex parte SOLLERS.—In the Matter of BURROUGH.

THIS was a Petition in the same Bankruptcy, under the like Circumstances, except that in this Case *Burroughs* retained the Bill in his own Hands; it had become due on the 13th of *July*, Three Days before his Bankruptcy, and was dishonored. It was again presented for Payment on the 8th of *August* following, and then by the provisional Assignee, to whom it was paid.

S. P. Except that in this Case, the Bill was not paid when it became due: it was afterwards paid to the provisional Assignee.

Mr. *Wingfield*, in support of the Petition.

Mr. *Heald*, and Mr. *Wray*, in addition to the Objections urged against the former Petition, insisted, that the Bankrupt by keeping the Bill, after it had become due, and not giving Notice of its Dishonor, had made it his own.

The Lord CHANCELLOR

Said, that the latter Argument only could apply in Cases where the Bill was ultimately bad; but that when it was good, the Party had a Right to it; and made the same Order as in the preceding Case.

Ex

LINCOLN'S INN HALL. 1811, *Aug.* 17.

A. entering into Partnership with *B.* applies to his Bankers for a Loan to constitute his Capital; they Consent, upon Condition that *B.* shall join, in a Security for the Repayment of the Loan; which is complied with. The Partnership open an Account with the Bankers, who also continue the private Bankers of *A.* On the Bankruptcy of the Bankers, the Balance on the joint Account, arising from this Loan, is against *A.* and *B.*; but *A.*'s private Account is in his Favor: *A.* and *B.* allowed to sett-off this private Balance against the joint Debt; it being but a Security for the separate. *A.* and *B.*, soon after the Partnership commenced, took in another Partner; but it was understood, that the Account with the Bankers, was to continue as before. This Partner drew Checks, in the Partnership Name, and paid them into his private Account. The Assignees held not entitled to charge the Checks so transferred, against the Partnership Account.

Ex parte HANSON.—In the Matter of CASTLE AND POWELL.

IN 1801, *Hanson* formed a Partnership with *Williamson*, and in order to raise his stipulated Proportion of the Capital, he applied to *Castle* and *Powell* his Bankers for the Loan of £10,000, and offered to deposit certain Deeds as a Security. They agreed to lend him the Money, but wished that *Williamson* should join in the Security. *Hanson* and *Williamson* accordingly gave a joint and several Bond; the Deeds proposed by *Hanson* were deposited, and the Money was advanced. *Castle* and *Powell*, who had long been, and up to the Time of their Bankruptcy continued to be, the private Bankers of *John Hanson*, were employed as the Bankers of the Co-partnership, and an Account opened in their Books under the Firm of *Hanson* and *Williamson*. In the Beginning of 1803, the Petitioners took *Benjamin Hanson* the younger into the Partnership, and the Firm was changed to *Hanson Williamson* and *Hanson*; but it was understood that the Account between *Hanson* and *Williamson* and the Bankers, should remain as they were. In the passage Book the Accounts remained under the old Head of *Williamson* and *Hanson*; but *Castle* and *Powell* in their Books, had without the Knowledge of *Hanson* and

Williamson,

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Ex parte HANSON.— In the Matter of CASTLE and POWELL.

Williamson, added the Name of *Benjamin Hanson*. *Benjamin Hanson* had a private Account with the Bankers, and he on the 27th of *July*, 1804, drew Three Checks in the Partnership Name, and against the Partnership Funds; One for £198:12*s*. the other for £150, and the Third for £15:12*s*:3*d*. and paid them in to the Credit of his private Account. *Castle* and *Powell* became Bankrupts, and a Statement of Accounts was delivered by their Assignees to the Petitioners, in which the Balance on their Banking Account was stated to be £209:15*s*:7*d*.; and that after giving them Credit for that Sum, a Balance of £6621:9*s*:9*d*. was stated to be due to the Assignees, on the said Loan of £10,000. This Sum *John Hanson* paid, except the Sum of £833:17*s*.: 7*d*. the Balance due on his private Account, and which he claimed to sett-off, as his private Balance was always intended by him to go in reduction of the Bond, he alone having been frequently applied to for Payment of it, and *Williamson* not having been resorted to till after the Bankruptcy. The Assignees, in *Michaelmas* Term, 1805, brought an Action for the Sum of £833:17*s*:7*d*.; but the Petitioners having discovered that *Benjamin Hanson* had not received the above Sums of £198:12*s*. £150, and £15:12*s*:3*d*. but had merely transferred them from one Account to another, they presented a Petition, praying a Declaration, that the said Bankrupts and their Assignees, were not entitled to charge the Petitioners, or to take Credit in the joint Account, for any Sums of Money which they did not actually pay in respect of the joint Account; or for any Sum of Money transferred from the joint to another Account: and it prayed a Reference to the Master, to take an Account of what was due to the joint Account, over and above the Sum of £209:15*s*:7*d*.; and that what should appear to be due, might be deducted from the Balance claimed on the Bond;

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Bond; or that the Assignees might pay back those Sums: it also prayed a Declaration of the Petitioners' Right to sett-off the Sum of £833, or so much of *John Hanson's* private Account as might be necessary against the Action on the Bond, with liberty to prove for, and receive Dividends on the Residue: it also prayed an Account of what was due on the Bond, and that it, and the other Securities mentioned in a Schedule, and which had been deposited at the Time of the Loan, might be delivered up. That the Assignees might be restrained in their Action for £833: 13*s*: 7*d*, might pay the Costs at Law, and of the Petition *(a)*.

By an Order, bearing Date the 22d of *April*, 1806, the *Lord Chancellor* allowed the Sett-off, and directed an Enquiry before the Master, as to what was due on the joint Account; and whether at the Time the Account was rendered to the Petitioners by the Assignees, and the Money paid on the Footing of it, they knew that the Money had not been actually advanced to *John Hanson*, but only transferred into his separate Account.

On the 7th of *March*, 1810, the Master made his Report, and certified the Facts already stated, and the Petition now came on to be heard on that Report.

The Lord CHANCELLOR

(Having stated the preceding Facts of the Petition at Length, proceeded as follows:)

I think that the Estate of *Hanson* and *Williamson* has been improperly charged with the Sums drawn out by *John Hanson*, and therefore the Assignees must pay them

(a) Ex parte Hanson, 12 *Ves.* 346.

back,

back, as having been transferred without Authority.—When this Petition was on before, it was declared that *John Hanson* ought to be allowed to sett-off the Balance on his separate Account, in the Action brought by the Assignees; I think that Opinion right: the joint Debt is nothing more than a Security for the separate one, and in Equity the Creditor who has such a joint Security, cannot resort to it without allowing what he has received from the separate Debts. Therefore these Sums must be repaid—the £833 allowed to be sett-off. Let the Securities be delivered up; and as it is too complicated a Case for Costs, I shall say nothing about them.

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Ex parte MASSON.—In the Matter of KIRBY.

LINCOLN'S INN HALL.
1811, *August*.

WILLIAM Kirby carried on Business at *Manchester*, on his separate Account, and also in Partnership with one *William Wilson*, who resided in *North America*, under the Firms of *William Wilson* and Co. and *Wilson* and *Kirby*. From the Month of *February* 1806, until *September* following, one *Thomas Bolton* occasionally applied to the Petitioner to effect Insurances upon Goods to a large Amount, on board various Ships

A. carrying on Business on his separate Account, and also in Partnership with *B.* gives a Bill of Exchange, drawn by himself, to the Order of *A.* and *B.*, and indorsed by them. A separate Commission issues against *A.*; *B.* dies: the Holder of the Bills, proves them under *A.*'s Commission: having afterwards learnt that distinct Accounts were to be kept of the Estates of *A.* and *B.*, he applied to be at Liberty to prove against the joint Estate of *A.* and *B.*, in addition to his Proof against the separate Estate of *A.* Ordered that he should be at Liberty, either to retain his present Proof, or to withdraw it, and prove against the joint Estate.

bound

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bound from *Liverpool* to *Savannah*, and from *Savannah* to *Liverpool*; which the Petitioners accordingly did. The Goods belonged to *Wilson* and *Kirby*. The Sum of £1038:17*s*:9*d*. having become due to the Petitioner upon such Insurances, he pressed *Bolton* for Payment of, or a Security for his Debt; and *Bolton*, in consequence thereof, on the 12th of *June*, 1807, sent to the Petitioner three several Bills of Exchange, dated *Manchester*, the 11th of *June*, 1807, drawn by *William Kirby* upon *Joseph Robinson* and Co. for the respective Sums of £300, £300, and £438:17*s*:9*d*. payable Three Months after Date, to the Order of the said *William Wilson* and Co. and indorsed by them, and also by *Bolton*.

On or about the 12th and 18th of *August*, 1807, the Petitioner received Orders from *Wilson* and *Kirby*, by the Agency of *Bolton*, to effect further Insurances upon Goods belonging to them, on board other Ships bound from *Liverpool* to *Savannah*, to the Amount of £10,734 in the whole, which the Petitioner accordingly did, and *Wilson* and *Kirby* thereby became indebted to the Petitioner in the further Sum of £479:3*s*:7*d*. for the Premiums of the said Insurance.

A Commission issued against *Kirby*; *Wilson* soon afterwards died; the Three Bills of Exchange were presented to *Joseph Robinson* and Co. and dishonored.

In *July*, 1808, the Petitioner proved his Debt on the Bills under *Kirby*'s Commission, and also on the £479:3*s*:7*d*. for Premiums, as the surviving Partner of *William Wilson*, but had received no Dividends.

The Petitioner having afterwards learnt that after issuing the said Commission, distinct Accounts were ordered to

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to be kept of the separate Estates of *Wilson* and of *Kirby*, he applied to the Commissioners to withdraw his former Affidavit, and tendered Affidavits to prove the two Sums of £1038 : 17*s* : 9*d*. and £479 : 3*s* : 7*d*. making together the Sum of £1518 : 1*s* : 4*d*. against the joint Estate of the said *William Wilson* and *William Kirby*; and also the said Sum of £1038 : 17*s* : 9*d*. against the separate Estate of the said *William Kirby*, and his Proof had been refused.

The Petitioner therefore prayed that his Proof might be admitted, and that he might be paid out of the respective Estates Dividends, in respect of the said several Estates, upon the said Sum of £1038 : 17*s* : 9*d*. rateably, not exceeding Twenty Shillings in the Pound; or if the Court should be of Opinion that he was not entitled to prove against both Estates, then that he might be at Liberty to prove against and receive Dividends from the joint Estate.

Mr. *Cooke*, in support of the Petition.

Mr. *Leach*, and Mr. *Parker*, for the Assignees.

The Lord CHANCELLOR

Ordered that the Petitioner might be at Liberty either to retain his present Proof, or to prove against the joint Estate, for the Sum of £1518 : 1*s* : 4*d*. and Dividends declared, and to be declared, to be paid by the Assignees to the Petitioner according to his Proof.

Ex

LINCOLN'S INN HALL.
1811,
August.

A Solicitor having struck a Docket, within the regular Time, gave in Commissioners Names, and ordered the Commission to be sealed; but through some Misunderstanding, the Fees were not left, and the Direction was not complied with.

Another Solicitor then struck a Docket against the same Bankrupt.

The *Lord Chancellor* held, that it would be construing the General Order of the 29th of *Dec.* 1806, too strictly not to let the first Commission issue; but directed the other Solicitor to be paid his Expences.

Ex parte EVANS.—In the Matter of SLATER.

ON *Saturday* the 27th of *July*, the Petitioner received by the Post, from one of his Clients, a Bond and Affidavit of one *John Aked*, in the usual Form, with Instructions to strike a Docket against *Samuel Slater*. He immediately on the coming in of the Post, struck the Docket, and paid the Fees.

On *Monday* the 29th of *July*, the Petitioner received by the Post, from the same Client, Commissioners Names, with Instructions to retain the Docket.

The Petitioner accordingly, before the Office Hours for Business on the following Morning, wrote out Commissioners Names, for the Commission, on a Piece of Paper, in the Words following:—"*In Re Samuel* "*Slater*. Commissioners Names, *Francis Maude, John* "*Hardy*, Esquires, *John Brogden, Greenwood Bent-* "*ley*, and *John Booth*, the younger, Gentlemen. *Evans*, "30th *July*, 1811."

The Petitioner kept a Book in his Office, of daily Memorandums for the Direction of his Clerks, in which Book was the following Entry, in his Hand-writing, under Date, *Tuesday, July* 30th: "*Re Slater*, bespeak Com- "mission," to which Memorandum was added the Letter *R.* denoting that *Henry Richards*, one of Petitioner's Clerks, had taken Charge of Commissioners Names, and to bespeak the Commission.

Richards accordingly, on the Morning *of Tuesday* the 30th of *July*, took the Papers containing Commissioners Names to the Office of the Secretary of Bankrupts, with the Intention of bespeaking the Commission, and of paying

ing

ing such Fees as were due. He gave the Paper to a Person who was standing at the Seat of Mr. *Charnock* in the Office, and whom he had been frequently accustomed to see in the Office, acting as a Clerk, and of whom he had recently before made Enquiries, and received Answers on official Business; and he told the Clerk distinctly, that he came to *bespeak the Commission*, and enquired if the Fees were paid, or what he had to pay: the Clerk took Petitioner's Docket from out of the Bundle, and looking at it, replied, very well, it is all paid, it is a Docket; and *Richards* imagining that the further Fees for the Commission had been previously paid by the Petitioner, or some other of his Clerks, left the Office.

The Petitioner believing that the Commission was bespoke, wrote to his Client to that Effect.

On the Morning of *Thursday* the 1st of *August*, another of the Petitioner's Clerks happening to be in the Bankrupt Office, was told by the Clerks there, that the Petitioner had lost a Commission that Morning; for that his Time was out on the Night preceding, and some other Person had struck a Docket; and upon going to the Secretary of Bankrupt's Office, the Petitioner found to his great Surprize, that the Clerks there had, on that Morning about Two Hours before, taken in Documents from Messrs. *Milne* and *Parry*, for a Commission of Bankrupt against the same *Samuel Slater;* and that Messrs. *Milne* and *Parry* had paid the Fees, but they had not then left Commissioners Names.

The Petitioner looking at the Bond and Affidavit, left by him on the 27th of *July*, found that the Paper bespeaking the Commission, and dated the 30th of *July*, was then attached thereto by a Wafer; but none of the Clerks recollected taking it in, or what passed on the Occasion, or who attached the Paper to the Bond. The Clerks in the Bankrupt Office declined to take from Petitioner

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tioner the Fees for sealing the Commission, without an Order from the *Lord Chancellor*, or the Consent of Messrs. *Milne* and *Parry*. Neither of the Commissions had been sealed.

The Petitioner therefore prayed, that his Lordship would be pleased to order that a Commission of Bankrupt might forthwith issue, founded upon the Affidavit and Bond of *John Aked*, in preference to the Commission applied for by Messrs. *Milne* and *Parry*.

Sir *Samuel Romilly*, and Mr. *Trower*, in support of the Petition.

Mr. *Hart*, for Messrs. *Milne* and *Parry*.

The Lord CHANCELLOR.

It would be taking the Practice too strictly, not to let the first Commission go; but Messrs. *Milne* and *Parry* must have their Expences *(a)*.

(a) Vide the General Order of the 12th of *February*, 1774; which directs, that a Docket being struck, and no Commission issued thereon, shall in no Case prevent the issuing of a Commission, on the Petition of any other Creditor; so as such second Application be not made in less than four Days after such Docket struck, exclusive of the Day of striking the same. And by the General Order of the 29th of *December*, 1806, it is ordered, that in case any Person who shall strike a Docket, shall not within four Days next after such Docket shall be struck, order a Commission to be sealed, at the then next public Seal, in case there shall be a public Seal within seven Days next after such Docket shall be struck, or by a private Seal within eight Days after the striking of such Docket, and shall not cause the same to be sealed accordingly; then that any Person may be at Liberty to sue out a Commisssion, without any Notice being given to the Person, who shall first have applied for such Commission.

Ex

Ex parte THOMPSON, AND ANOTHER.—In the Matter of ALEXANDER CARSON, AND WILLIAM DISTELL.

LINCOLN'S INN HALL. 1811, *Aug.* 19.

THE Commission issued on the 21st of *March*, 1811, and the Petitioners, together with *John Gladstone*, had been chosen Assignees. In *April* 1810, the following Agreement was made between the Bankrupts and Messrs. *Heywood* and *Gladstone*:—*Liverpool*, 19th of *April*, 1810. Messrs. *N. Heywood* and *John Gladstone*, Sirs, We propose to consign to you for Sale, different Parcels of Goods consisting of Cottons Sugars, &c., you agreeing to advance to us about Three-fourths of the present Market Value of such Goods, in Bills on *London*, upon their being put into your actual Possession, or the Possession of your Brokers, Messrs. *Ewart* and Co.: that is, upon the Keys of the Warehouse where they lie being delivered, and the Goods received by you or them; and we hereby authorize you to sell these Goods, at fair Market Prices, here or elsewhere, as you may judge expedient, and when you may think proper: the Proceeds you will apply to the Repayment of the Advances made to us, after deducting your Commission, with Interest on the Advance, Brokerage, Insurance against Fire, and all Charges; and should the neat Proceeds so received by you, not cover your Advances, we hereby engage to make good and repay any Deficiency, Reduction in Value, or bad Debts; and should the Proceeds exceed your Advances, such Surplus you are to repay us when received by you. *Carson* and *Distell.*

A. and *B.* deposit Property with *C. D.* as a Security for a Debt, with Power to sell. *C.* and *D.* sell and deliver these Goods to *A.* and *B.* taking as Payment Bills drawn by their Broker on them. *A.* and *B.* become Bankrupts, *C.* and *D.* are entitled to prove only their actual Debt, and to receive Dividends *pari passu* with the other Creditors, and not the Amount for which they resold the Goods to *A.* and *B.*

Heywood and *Gladstone* assented to such Proposal, advanced the Money, and the Bankrupts gave them the

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actual Possession of Cotton Sugar and other Articles of considerable Value. Messrs. *Heywood* and *Gladstone* entrusted the Goods to Messrs. *Ewart* and Co. to be sold on their Behalf, and for their Reimbursement; and in *May* and *June* 1810, they, under the Direction of *Heywood* and *Gladstone*, sold the greater Part of them, amounting to £10,648 to Messrs. *Sill* and Co., who as was known to Messrs. *Ewart* and Co., and also to *Heywood* and *Gladstone*, were acting as the Brokers of *Carson* and *Distell* the Bankrupts. The Payment for such Sale was by Bills at Four Months Date, drawn by Messrs. *Sill* and Co., and accepted by the Bankrupts *Carson* and *Distell*. The Goods sold were delivered to *Carson* and *Distell*, and Bills at Four Months Date were drawn by *Sill* and Co. on them, which were accepted and delivered to *Heywood* and *Gladstone*.

The Bankrupts afterwards purchased a further Quantity of the deposited Goods, amounting to £6220, to be paid for in Two Months, by Bill at Two Months; but which Bills were never given. At the Expiration of the Time frequent Applications were made by *Ewart* and Co., and *Gladstone* and *Heywood*, to *Sill* and Co., and to *Carson* and Co., either for the Bills or for Payment of the Money; but without Effect: *Carson* and Co. alledging that the Acceptances they had already given to *Gladstone* and *Heywood*, would, when paid, reimburse them the Money advanced by them, or nearly so. *Heywood* and *Gladstone* however, pressed for some Payment on Account; but *Sill* and Co. soon afterwards stopping Payment, and *Carson* and *Distell* becoming Bankrupts, they never received any thing on Account of the last Purchase; nor were the first Acceptances paid.

At the Time of the last Sale to *Sill* and Co. the Bills received by *Heywood* and *Gladstone*, drawn by *Sill* and Co.,

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Co., on *Carson* and Co., exceeded in amount their Advances to the Bankrupts, and all Charges to which they were entitled, in the Sum of about £156. *Heywood* and *Gladstone* had been allowed to prove under this Commission, the Amount of the Bills drawn by *Sill* and Co., and accepted by the Bankrupts, for the Sum of £10,648, exceeding in amount by £156, the actual Debt due from the Bankrupts to them, and also the Sum of £6220, the Amount of the last Purchase, for the Purpose of receiving Dividends thereon, until they should be satisfied the Balance remaining unpaid by the Dividends upon their Proof upon the Bills.

The Petition prayed, that the Proof made by *Heywood* and *Gladstone*, in respect of the £6220 and the £156, might be expunged.

Sir *Samuel Romilly* and Mr. *Montagu*, in support of the Petition, contended, that *Heywood* and *Gladstone* had parted with their Lien, and were only entitled to claim for their actual Debt.

Mr. *Hart*, and Mr. *Cullen*, *contra*, insisted, that under the Terms of the Agreement, a Sale to the Bankrupt must be considered as a Sale to any indifferent Person, and that they were therefore entitled to prove for the full Amount of the Purchase-money.

The Lord CHANCELLOR

Made the Order according to the Prayer, and directed the Proof of the £6220, and the £156, to be expunged.

Ex

LINCOLN'S INN HALL. Adjourned Sittings before *Mich. Term.* 1811, *Nov.* 4.

Warrant of Attorney to secure the Repayment of £600, with Interest from the 25th of *March*, usurious unless the whole of the Money was actually advanced on that Day; but if the Agreement were, that the Money being *quasi* paid to the Borrower on that Day, but left in the Lender's Hands as a Banker, to be drawn out from time to time, as the Borrower wanted it, though the Money not being ready, at a Time when so applied for, would be a Breach of the Contract, yet it would not be Usury: but upon that as a Question for a Jury an Issue offered. In this Case, the Lender having taken out Execution on the Warrant of Attorney, gave up the Proceeds received from the Sheriffs, under an Agreement with the Assignees, (who gave him a Release,) that he should come in with the other Creditors for the Balance due to him: such Agreement held to mean a *proveable* Balance, and not to let in the Debt if affected with Usury.

Ex parte BANGLAY.—In the Matter of POST.

THE Petitioner, in the Month of *March* 1809, agreed to lend the Bankrupt the Sum of £600, at £5 *per Cent.*, to enable him to go on with his Trade, upon his Warrant of Attorney to confess Judgment to that Amount. The £600 was accordingly provided by the Petitioner, and ready to be advanced on the 25th of *March*, and was advanced in several Sums daily, or at such Times as the Bankrupt required them, from the 26th of *March* to the 1st of *June*, by which Day the whole was advanced. Soon after the Petitioner had begun to make these Advances, the Bankrupt executed a Warrant of Attorney, according to the Proposal, for securing the £600 with Interest. The Bankrupt finding that Sum insufficient for his Purposes, applied to the Petitioner for further Assistance; and in compliance with his Request, Petitioner continued to supply him with Monies for carrying on his Trade, by discounting his Bills to a large Amount.

The Petition then stated, that the Petitioner in the Month of *March* 1810, finding himself deeply involved with the Bankrupt, called upon him for all the Money he could

could spare, towards lessening his Debt; and between the 27th of *March*, and 10th of *May*, received from him in Bills and Cash a Sum of £497: this reduced the Bankrupt's Debt to the Petitioner to a small Sum, exclusive of the original Debt of £600 and Interest. The Petitioner caused Judgment to be entered up, and Execution to be levied on the Bankrupt's Goods and Stock in Trade, on the 10th of *May;* and the Bankrupt having very soon after committed an Act of Bankruptcy, caused a Docket to be struck against him, on which the present Commission issued, and Assignees had been regularly chosen.

The Sheriffs of *Bristol* delayed selling under the Levy, on Account of the Bankruptcy; but soon after, with the Consent of the Assignees, they sold the Bankrupt's Effects; and after some Disputes respecting the Produce, Petitioner received the Sum of £600 and the Arrears of Interest from the Sheriffs, on giving them an Indemnity.

The Bankrupt's other Creditors insisting that Petitioner could not retain the Money received from the Sheriffs, nor the Bills or Cash he had received from the Bankrupt, during the last Two or Three Months preceding the Bankruptcy, the Petitioner came to a Settlement with the Assignees, who had been authorized by the Creditors at a Public Meeting, to settle the whole disputed Matter with him. Accordingly the Petitioner attended a Meeting of the Assignees, and after (as the Petitioner alleged) a close and minute Examination of the Accounts between the Petitioner and the Bankrupt, it was then agreed, that a Line should be drawn with regard to Petitioner's Receipts and Advances on the 31st of *March*, 1810: that Petitioner should refund what he had received on and after that Day, deducting what he had paid on and after that Day on the Bankrupt's Account; that he should refund the £600 and its Interest received from the Sheriffs,

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Sheriffs, and deliver up a Box of Plate-glass he had in his Possession, which he had paid for, or was liable to pay for, on Account of the Bankrupt: and that he should come in with the other Creditors, for the Balance due to him from the Bankrupt, and that the Assignees should give him a general Release, which was accordingly done.

The Petition further stated, that on the 20th of *February* last, a Meeting was held, pursuant to Public Notice in the *London Gazette*, for the Purpose of declaring a Dividend of the Bankrupt's Estate; at this Meeting Petitioner attended for the Purpose of proving his Debt, and he produced his Account, by which it appeared that the Balance due to him from the said Bankrupt, amounted to the Sum of £1388:7*s.* including the said Sum of £600 and its Interest, calculated from the respective Times of advancing the same. But the Commissioners, though they permitted him to prove the Sum of £565:6*s.* Part of the Balance, in addition to the Sum of £200, which he had before proved under the said Commission, yet they refused to suffer him to prove the £600 or its Interest, on the Ground that the Advance was usurious, although the Petitioner produced the Agreement, under which he was to be at Liberty to come in with the other Creditors, and also the Release from the Assignees.

The Petitioner prayed that he might be at Liberty to prove his said Debt of £600, together with the Interest thereof, from the Time of the respective Advances to the said Bankrupt, up to the Time of the Bankruptcy, in addition to the Sum already proved by him under the Commission; and that he might be paid Dividends in respect thereof, rateably and in proportion with the other Creditors of the Bankrupt, seeking Relief under the Commission; and that the Costs of the Application might be

be paid to him by the Assignees out of the Bankrupt's Estate.

There was an Affidavit by the Petitioner, that the £600 was in his Hands, on the 25th Day of *March*, 1809, ready to be advanced by him then, or at any Time the Bankrupt should think fit to call for it: and that his Stipulation was not for £5 *per Cent.* from that Time, but for legal Interest; and there were Affidavits in opposition, directly contradicting this.

Mr. *Martin*, and Mr. *Bell*, for the Petitioner, relied upon the Statement in the Petition and Affidavit, that the whole Sum was ready to be advanced on the 25th of *March*, or at any Time after when called for by the Bankrupt; that at any Rate having refunded that Sum and the Interest, which he had received from the Sheriffs, under the Execution, upon the Faith of the said Agreement and Release, he ought to prove the £600 as Part of the Balance due to him from the Bankrupt, together with such Interest as was due on the same, at the Time of the actual Advances thereof, and that the Release operated as a final Discharge to all Objections.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Parker*, *contra*.

The Lord CHANCELLOR.

The Warrant of Attorney in this Case, was given to secure the Repayment of £600 with Interest, from the 25th of *March*: if this £600 was not paid at that Time in one Payment, but in Parcels at different Times, the last of which was in *June*, it is impossible to say the Transaction is not usurious. It has been said that *Banglay* had the £600 ready, that the Bankrupt might have had

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had it, and the Case has been assimilated to that of a Banker: and if that was in fact the Agreement, and the Transaction was *bonâ fide* that the Money being as it were paid to the Bankrupt, and repaid by him to the Lender, or left in his Hands to be drawn out as he wanted it, I do not think that the Money not being ready at a subsequent Time, though a Breach of the Contract, would affect it with Usury; but then it must be made out to the Satisfaction of a Jury, that such Arrangement was without Device or Evasion: upon the present Petition it is too much to say the Commissioners were wrong. Then as to the Deed-Poll; when it is said in a Deed that certain Disputes subsisted, it is competent to the Parties to produce Evidence to shew what such Disputes were; but this Deed expressly states, that divers Disputes had arisen, and lately subsisted between the Assignees and the Petitioner, of and concerning divers Sums of Money, and particularly the several Sums of Money following: Levy Money in the Cause *Banglay* against *Post*. As to the Stipulation for the Petitioner's coming in for the Balance with the rest of the Creditors, it amounts to nothing; he would have that Right independent of such Agreement; but then he must still shew what such proveable Balance is.

If you wish an Issue, I will not refuse it; but otherwise this Petition must be dismissed.

The Petitioner having declined an Issue, the Petition was dismissed with Costs.

Ex

LINCOLN'S INN HALL. 1811, *Nov.* 5.

Ex parte HOLDEN.—In the Matter of READ.

The Commissioners under the 51 *Geo.* III. c. 15. for issuing *Exchequer* Bills to Manufacturers, &c. admitted under the 48th Sect. of the Act, to prove (by their Secertary) the full Amount of their Principal with Interest up to the complete Payment of the Principal, in preference to all other Creditors of the Bankrupt.

THIS was the Petition of the Secretary to the Commissioners, appointed under the 51 *Geo.* III. c. 15. for the Purpose of advancing *Exchequer* Bills for the Accommodation of Manufacturers and others, during the then State of Commercial Credit; it prayed that the Petitioner might, under the 48th Section *(a)* of the Act, be

(a) The Petition set forth the Act, the material Parts of which are as follow:—

Sect. 48. enacts, that every Obligation or other Security entered into, or given from and after the passing of this Act, by any Person or Persons, either as Principal or Surety, who shall afterwards become Bankrupt, within the true Intent and Meaning of the several Statutes made and now in force concerning Bankrupts, and against whom a Commission of Bankrupt shall be awarded and issued out, in that Part of *Great Britain* called *England*, shall, by reason and force of such Bankruptcy, and from the Time of such Bankruptcy, become and be forfeited, and due and payable, as against such Bankrupt or Bankrupts, and that all the Estate and Effects of such Bankrupt or Bankrupts which would be liable to satisfy the Demands of the Creditors seeking Relief under such Commission of Bankrupt, shall be liable and subject to, and are hereby made chargeable with the Payment of the Principal and Interest due upon such Obligation or other Security, and all Costs attending the Recovery of the same; and that the Claims of the said Commissioners shall be first paid and satisfied out of the Estate and Effects of such Bankrupt or Bankrupts, and in preference to the Claim of any other Creditor or Creditors; and it shall be lawful for the said Commissioners,

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be admitted to prove a Bond given by the Bankrupt as a Security for a certain Quantity of *Exchequer* Bills issued to him. Such Proof to be in preference to all other Claims under the said Commission.

There was an Affidavit of Service, on the Commissioners named in the Commission, on the provisional Assignee, on the Solicitor to the Commission, and on the regular Assignees, who were subsequently appointed: there was also an Affidavit of the Petitioner that the *Exchequer* Bills, mentioned in the Petition, had been issued; and an Affidavit of one of the Clerks, employed by the Commissioners under the Act, that he had searched the Bankrupt Office, and found a Docket had been struck against *Read.*

Sir *Arthur Piggott,* in support of the Petition.

Mr. *Cooke,* for the Assignees.

Commissioners, in the Name of their Secretary, for the Time being, to apply by Petition in a summary Way to the proper Courts in *England,* having Jurisdiction of the Matters of such Commission of Bankruptcy, to make due Order accordingly, which such Courts respectively are hereby required and authorized to make.

The 54th Section enacts, that the Commissioners may, in the Name of their Secretary, apply for a Commission of Bankrupt.

By the 55th, the Commissioners of Bankrupt are to admit the Proof of the Debt, upon the Oath of the Person appointed for that Purpose, who is to vote in the Choice of Assignees, &c.

The 56th Section provides, that the Bankrupt's Estates and Effects shall be subject to the Claims of the Commissioners appointed under the Act, *until the same shall be fully paid, or secured to be paid.*

The

1811.

Ex parte HOLDEN.— In the Matter of READ.

The Lord CHANCELLOR.

This being the first Case under the Act, doubted up to what Time he ought to order the Payment of the Principal and Interest, and whether he should give it beyond the Bankruptcy, and the Forfeiture of the Bond. The following Order was made:—

Now, upon Hearing the said Petition read, and what was alledged by the Counsel for the said Parties, I do, pursuant to a certain Act of Parliament, passed in the Fifty-first Year of the Reign of our Sovereign Lord King *George* the Third, intituled, "An Act for enabling His "Majesty to direct the Issue of *Exchequer* Bills to a "limited Amount, for the Purposes, and in manner "therein mentioned," declare, that the Estate and Effects of the said *John Read*, the Bankrupt, is chargeable with the Principal and Interest up to the Time of the Payment of the Principal; and *I do*, in pursuance of the Directions contained in the said Act, order that the Sum of £25,000, mentioned in the said Petition, together with the Interest thereon, up to the Time of Payment thereof, be paid out of the Estate and Effects of the said Bankrupt, in preference to the Claim of any other Creditor or Creditors of the said Bankrupt, to the Cashier or Cashiers of the Bank of *England*, according to the Directions of the said Act, recited in the said Petition, and that the Costs occasioned by this Application be, and all Costs attending the Recovery of the said Sum of £25,000 and Interest, up to the Time of Payment, be in like Manner paid by the said Assignees out of the said Bankrupt's Effects, to the Petitioner, *William Holden*, as Secretary to the said Commissioners.

Ex

Nov. 5.

Ex parte BROWN.

Certificate sent back; Creditors having signed, before the Bankrupt had passed his last Examination.

THIS was a Petition to stay a Certificate on the Ground that it had been signed before the last Examination; those Signatures had obtained the Certificate.

Mr. *Cooke*, in support of the Petition.

Mr. *Cullen*, for the Bankrupt, admitted it was so.

The Lord CHANCELLOR

Ordered the Certificate to go back *(a)*.

(a) There can be no stronger Proof, of the Goodnature and Humanity of the *British* Character, than the Readiness with which Creditors sign, even previously to the Third Meeting, when a full Disclosure is to be made; though at the Time of signing there has been no Examination; and I mention it with a Hope, that Commissioners will remember, that it is very doubtful, whether a Signature previous to the last Examination, is such as the Act of Parliament intended. *Per* Lord *Eldon*, in *Ex parte King*, 11 *Ves.* Rep. 424. *Vide* also the General Order of the 8th of *August*, 1809, in the First Part of these Cases, directing Creditors to annex to their Subscription to the Certificate, the Day of the Month and Year, on which they signed it.

Ex

LINCOLN'S INN HALL. 1810, *Aug.* 17.

Ex parte HOWTON, *Ex parte* GRIBBLE.—In the Matter of COOKE, AND HERBERT *(a)*.

THESE Petitions having been argued stood for Judgment.

The Lord CHANCELLOR.

The first of these Petitions prays, that Five-sixteenths Shares of a Ship called the *Devonshire*, may be declared to be the separate Property of *Herbert*; the other prays, that the same Shares may be declared to be the separate Property of *Cooke*; in 1805, a Bill of Sale of the Ship in question was executed to *Cooke*; and previous to the Registry, several Shares were disposed of to other Persons, *Herbert* not being one: but Ten-sixteenths were reserved by *Cooke* himself. At the Time of this Purchase, *Cooke* and *Herbert* were in Partnership; *Cooke* was the managing Owner; the Profits were to be Partnership Property; and the Outfit was to be charged to the joint Account of *Cooke* and *Herbert*. *Herbert* applied to *Cooke* for a Share; and there was an Agreement that he should bring in the Purchase-money for Five-sixteenths, or be debited to that Amount, in the Partnership Account; but he never, in fact, paid the Purchase-money either to *Cooke*, or to the Partnership. A Bill of Sale was accordingly executed to him of Five-sixteenths, in which the Registry, which had been regularly made, was recited, and a Receipt for the Purchase-money indorsed; but the Money never was paid. The separate Creditors of *Cooke*, contend that these Five-sixteenths must still be considered as his separate Property, and *Herbert* as his Trustee; the joint

The Name of the Person appearing as the Owner, in the Registry of a Ship, is conclusive Evidence of his Title; more particularly against any Trust, arising, not by Operation of Law, but by the direct Act of the Parties: as it would defeat the Object and Policy of the Registry Acts, if equitable Interests were not excluded.

(a) S. C. 17 *Ves.* 251.

Creditors

1810.

Ex parte HOWTON, *Ex parte* GRIBBLE.— In the Matter of COOKE, and HERBERT.

Creditors on the contrary, contend that the Purcha originally made, as a Partnership Speculation; ar upon the Circumstances of the Profits and the Ou Evidence of that: the separate Creditors of *Herbert* that the Title upon the Registry is conclusive *(a)*. several Claims are supported by Affidavits, as con tory as the Petitions; and it is impossible to say co what the Facts are: but taking it for granted, that T teenths of this Property were in *Cooke*, and purchase his Money, and that by his Act and Concurrence sixteenths have become vested in *Herbert*, it cann held, that *Herbert* should account for those Sixte it is impossible to raise such an Equity, not upc Operation of Law *(b)*, but upon these Acts c Parties; or to say that any Title is good, against the rent Title on the Registry; as in the very strong C an Action on a Policy of Insurance, in which the I was averred to be in four; it turned out that they w equitably interested, but that the Names of onl were in the Registry; and it was held that the Ave was not good, the Act of Parliament having shut o equitable Interests. If you desire an Enquiry, whose Money was really applied, in the Purchase of Shares, I will not refuse it; but on the Principle already stated, that the Title on the Registry is c sive, I do not encourage it *(c)*.

(a) Ex parte Yallop, 15 *Ves.* 60. 71. Stat. 26 *Geo.* III. c. 60. 34 *Geo.* III. c. 68.

(b) Vide Curtis v. *Perry*, 6 *Ves.* 746.

(c) Camden v. *Anderson*, 5 T. R. 709. *A.* and *B.* Partners, purchased a Ship under a Bill of Sale, conformable to the Statu *Geo.* III. c. 60.; after they took in two other ners *B.* and *C.*; but was no Transfer of th to them: the Purcha ney was paid by the f Held that *B.* and C. ha ther a legal or equ Title to the Ship. An

Lord *Kenyon*, if an equitable Interest in Ships could prevail, in contradistinction to a legal Interest, it would repeal the wise Provisions of that Act, which has already proved highly beneficial to the trading and commercial Interests of this Country.—*Vide Hibbert* v. *Rolleston*, 3 *Bro.* 571.; but for the Reasons of that Decision, which are not given in *Brown*, *vide* Lord *Eldon*'s Judgment in *Mestaers* v. *Gillespie*, 11 *Ves.* 625. *Curtis* v. *Perry*, 6 *Ves.* 746.

LINCOLN'S INN HALL. 1811, *August.*

The Court has not Jurisdiction to appoint a Receiver, upon Petition in Bankruptcy.

Ex parte TUPPER.—In the Matter of SMITH.

THE Object of this Petition was, that a proper Person might be appointed a Receiver of certain Property of the Bankrupt's, in which the Petitioner claimed an Interest, and a Reference to the Master for that Purpose.

Mr. *Hart*, for the Petition.

Sir *Samuel Romilly*, and Mr. *Cullen*, *contra*, objected to the Order's being made on Petition.

The Lord CHANCELLOR

Allowed the Objection, recommending the Petitioner to file a short Bill *(a)*.

(a) The Court has not Jurisdiction to appoint a Receiver, unless a Cause is depending, except in the Case of Idiots and Lunatics. *Ex parte Whitfield*, 2 *Atk.* 315.

Mich. Term. 1811, *Nov.* 9.

Injunction ordered upon an interpleading Bill, filed by a Debtor, against the Bankrupt and his Assignees; but the Court will not suffer a Bankrupt, by Means of such a Bill, to try the Validity of his Commission.

LOWNDES *v.* CORNFORD, AND OTHERS, Assignees of LANGSTON, AND ANOTHER, Bankrupts.

THE Bill stated, that during the Years 1808, 1809, and 1810, the Plaintiff had incurred a Debt to the Bankrupts for Coals to the Amount of £38:15*s*:2*d*. The Commission issued on the 21st of *November*, 1810. The Bankrupts shortly after, insisting that the Commission was invalid, gave the Plaintiff Notice not to pay his Assignees, and brought an Action; the Assignees also threatened to do the same. The Bill prayed that the Assignees and the Bankrupt might interplead, and an Injunction on Payment of the Money into Court. There was the usual Affidavit that the Plaintiff did not collude with either of the Defendants.

Mr. *Raithby*, on moving for the Injunction, intimated a Doubt how far an Application of this Kind could be sustained between a Bankrupt and his Assignees.

Sir *Samuel Romilly* opposed the Motion, as founded on a Kind of interpleading Bill, unheard of in the Practice of the Court; and with a View indirectly to try the Validity of the Commission.

The Lord CHANCELLOR.

I apprehend I must entertain this Motion, though I do not like to make an Order on so small a Sum; Commissions are every Day disputed, and where a Debtor is harassed between the Bankrupt and his Assignees, such a Proceeding is necessary. But I will not suffer a Bankrupt to try his Commission in this way.

(Sir

(Sir *Samuel Romilly* said, he did not object to the Injunction.)

Let the Injunction go.

1811.

LOWNDES v. CORNFORD, and Others, Assignees of LANGSTON, and Another, Bankrupts.

Ex parte BOZANNET.—In the Matter of HARDENBERGH.

1811, *Nov.* 28.

ON the 16th of *July*, 1811, the Assignees caused the Lease of the House, in which the Bankrupt carried on the Trade of a Plaister Figure Manufacturer, and his Stock in Trade, &c to be sold by public Auction. The Petitioner became the Purchaser, and was put into Possession.

A Creditor proceeding at Law obtains an Order for an Enquiry before the Commissioners, and afterwards takes out Execution.

Ordered to withdraw that Execution with Costs.

A Stranger to the Commission applying for and obtaining an Order in Bankruptcy, brings himself within the Jurisdiction.

Nov. 9.

The Bankrupt obtained his Certificate; but before it had been allowed by the *Lord Chancellor*, *Charles Lafferf*, who was a Creditor of the Bankrupt for a Debt of £200, on which he had brought an Action in the *Common Pleas*, and had obtained Judgment, presented a Petition, stating Circumstances impeaching the Validity of the Commission, and praying that it might be superseded, or that a certain Debt might be expunged; that there might be a new Choice of Assignees, with the usual Directions; and that he might be permitted to prove his Debt under the said Commission; and that in the mean Time the Certificate might be stayed.

Upon that Petition the *Lord Chancellor* made an Order, that the Commissioners should review the Proof

1811.

Ex parte BOZANNET.— In the Matter of HARDENBERGH.

of the Act of Bankruptcy committed by *Hardenbergh*; and the Particulars of the Debt which the Petition prayed should be expunged.

On the 11th of *November*, 1811, before the Order or the Minutes could be obtained from the Secretary of Bankrupts, *Laffert*, who had previously entered up Judgment on his Debt, took out Execution, under which the Sheriff entered upon the Premises, and seized the Goods and Effects purchased by the Petitioner.

This Petition therefore prayed, that *Laffert* might be restrained from selling and disposing of the Goods and Effects; that he might be ordered to direct the Sheriff to quit Possession, and give them up; and that he might pay the Costs of the Application.

Mr. *Wetherell*, in support of the Petition, contended, that *Laffert* having applied for and obtained his Lordship's Order, had made an Election to relinquish his Proceedings at Law, within the 49 *Geo.* III. c. 121. s. 14.

Sir *Samuel Romilly*, and Mr. *Montagu*, on the other Side, stated, that pending the Enquiry into the Validity of the Commission, the Petitioner, who was a mere colorable Purchaser, had been removing the Property; and that *Laffert* had taken this Step to protect himself, in case the Commission should be superseded; and that further, this being a Petition against a Person who was a Stranger to the Commission, proceeding upon his legal Rights, the Great Seal, upon the Authority of *Ex parte Callow*, 3 *Ves.* 1. *(a)*, had no Jurisdiction.

The

(a) In *Ex parte Callow*, *Nov.* 11th, 1795; the Creditor had proved his Debt; he afterwards brought an Action,

1811.

Ex parte BOZANNET.— In the Matter of HARDENBERGH.

The Lord CHANCELLOR.

The Application on this Petition, is not that a Creditor should be injoined against proceeding at Law; but the Question is, whether a Creditor having come here, and after an Order has been made at his own Instance, shall be suffered to take out Execution, without applying to set that Order aside, or obtaining the Leave of the Court for that Purpose: and I am of Opinion that he should not. If the Statement be true, that the Petitioner has been removing the Goods, which are the Subject of this Execution, they must be restored: things must be put in the State in which they were at the Time of the Order.

The Petitioner must have his Costs, unless the Goods have been removed by him, or by his Direction; and on that I give him Leave to make an Affidavit.

tion, and charged the Bankrupt in Execution; no Dividend having been then declared. Upon a Petition of the Bankrupt for his Discharge, Lord *Rosslyn*, C. held that he could not deprive the Plaintiff at Law of his legal Remedies. 3 *Ves.* 1. Upon that Case it is material to observe, that as the Law then stood, a Creditor, even after he had received Dividends, might refund them, and resort to his legal Remedies.

Ex

1811.

Ex parte JOSEPH.—In the Matter of LEIGH.

When Concealment of Property by the Bankrupt is positively established, the Great Seal will refuse the Certificate; *secus* where the Petition alleges merely Information and Belief, as to that Fact.

A Creditor who is suing the Bankrupt at Law, is entitled to no Benefit under the Commission, and has no Resource to the Great Seal, unless he gives up his legal Proceedings.

THIS Petition presented by *Abraham Joseph*, prayed that the Bankrupt's Certificate might be stayed, and that his Lordship would be pleased to make such further, or such other Order, as he should think fit. The Petitioner had not come in under the Commission, but had charged the Bankrupt in Execution.

The Petition, and the Affidavits in support of it, stated, "that great Concealments had been made of the Pro-"perty of the Bankrupt, to the great Injury of his Cre-"ditors;" that the Bankrupt, previous to his Bankruptcy, had, as the Petitioner *was informed and believed*, considerable Quantities of valuable Furniture, Plate, and Wines; that immediately previous to his Bankruptcy, and in order that the same might not be seized by the Messenger under the Commission, he secretly disposed thereof, to *John Kinnear*, for a mere nominal Consideration, and with an Understanding that such Goods were still to remain the Property of the Bankrupt, and to be delivered to him as soon as his Certificate was allowed; and that he had not accounted for them in his Examination before the Commissioners.

That he was concerned in a Rope-making Business, in *Liverpool*, carried on in the Name of *Leigh* and *Hodgkinson*, for which he had advanced nearly the whole Capital, *Hodgkinson* being merely the Manager; that previous to his Bankruptcy he raised a large Capital, and enriched the Rope-making Concern at the Expence of his private Estate, for the Purpose of again resuming his Situation therein, as soon as he had obtained his Certificate.

sate. That on the Eve of his Bankruptcy, he purchased, at ready Money, from the Partnership Concern, a Quantity of Cordage, at the Rate of £90, *per* Ton, and had since disposed of the same at the Rate of £50 *per* Ton.

That he was entitled to a Share of a Ship called the *Belmont*, which some little Time previous to his Bankruptcy, as the Petitioner *was informed and believed*, he transferred, together with other considerable Property, to Messrs. *Ewart* and *Rutson*, in *Liverpool*, for the Purpose, in the first Place, of securing the Payment to Mr. *George Ored*, Solicitor, in *Liverpool*, of such Bills of Costs as he then had or thereafter might have against the Bankrupt, which Property or Part thereof, had been applied to the Partnership Concern of *Leigh* and *Hodgkinson*.

That the Petitioner had *been informed and believed* that *Leigh*, previous to his Bankruptcy, purchased from Messrs. *Denison* and Co. a Ship called the *Eliza*, which he immediately previous to his Bankruptcy, fitted out for Sea, by sheathing her with Copper, Rigging, Sails, and other Necessaries to a considerable Amount; that the Vessel was not assigned to him before his Bankruptcy, although the Deponent *had been informed and believed* that *Denison* and Co. had been paid the Purchase-money, out of the private Funds of *Leigh*; and that after the Bankruptcy, as the Deponent had *been informed and believed*, the Ship so fitted out and completed by *Leigh*, was conveyed unto *Hodgkinson*, or unto *Leigh* and *Hodgkinson* in Co-partnership.

The Affidavit of the Bankrupt in answer, "denied "that great Concealments had been made of his Pro- "perty, to the Injury of his Creditors or otherwise;" or that he had, previous to his Bankruptcy, considerable Quantities

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Ex parte JOSEPH.— In the Matter of LEIGH.

Quantities of valuable Household Furniture, Plate, and Wines; that in *July*, 1810, being distressed for Money he had sold the greatest Part of his Furniture, &c. to satisfy his Creditors; and that in *June*, 1811, he had sold the Remainder, except a few Articles of Plate which he had given up to his Assignees, for £370. He admitted that he was concerned with *Hodgkinson* in a Rope-making Business at *Liverpool*, under the Firm of *Leigh* and *Hodgkinson*, in which he had advanced nearly the whole of the Capital. That *John Hodgkinson* was the Person resident near the Works, as the Overlooker or Manager; but denied that he had enriched that Concern by the Sacrifice of his private Estate, and he went through the different Allegations of the Petition, denying some and explaining the others,

Mr. *Hart*, Mr. *Agar*, and Mr. *Montagu*, in support of the Petition,

Sir *Samuel Romilly*, and Mr. *Bell*, for the Bankrupt,

The Lord CHANCELLOR.

This Petition is presented by a Person upon whose Name and Notoriety in this Court, and his Motives in coming here, much Observation has been made in the Course of the Argument; but whose Name I do not mention, because in this, as in every other Petition, I put that entirely out of the Question, and think no more of the Name in this Petition, than I do of that in the one that may be next called on before me. It prays that the Certificate may be stayed, and that under the general Words I should do something more; but more I cannot do upon his Petition.

I have had Occasion within these seven or eight Years past,

1811.

Ex parte JOSEPH.— In the Matter of LEIGH.

last, frequently to consider with much Pain *(a)*, whether, upon an Allegation of Concealment, I ought to stay the Bankrupt's Certificate; this Allegation imputes a Fact so highly criminal, that it is right I should consider it with very great Attention; my Practice has been, where there has been a positive Affidavit, that the Bankrupt has not made a full Disclosure to refuse the Certificate, because he has not complied with the Requisites entitling him to it. Both the Cases cited at the Bar *(b)*, were Cases in which the Parties applying to me had a direct Interest, and both brought forward positive Facts of Concealment. When a Person who has proved comes forward to stay a Certificate on Grounds of Concealment, he brings forward two Propositions; first, that I ought not to affect his Debt by granting it; and secondly, that what the Bankrupt has done, perhaps amounts to a capital Felony: if he leaves it in Doubt, whether there has been Concealment or not, it is a Duty to the Bankrupt, to grant his Certificate, and let him try it at Law: but at Law a Person never could be admitted to say, he was informed and believed, that such Concealment had taken place. When a Person who has not proved comes here, he comes in a public Right, and is *quasi* a public Prosecutor, and I ought *a fortiori*, to say to him, try your Question at Law. It is quite clear, that a Concealment even of Five Shillings above the Amount specified, makes the Consequence the

(a) Ex parte Bangley, 1810, *June* 14th. This was an Application to stay a Bankrupt's Certificate, on the Ground that he had not made a full Disclosure. The *Lord Chancellor* doubted the Propriety of sending the Certificate back to the Commissioners to be reviewed; but judging from Circumstances appearing on his Examination that there had been Concealment, stayed the Certificate. *Vide* 17 *Ves.* 117.

(b) Ex parte Beadon, *Ex parte Parkinson*,

same

1811.

Ex parte JOSEPH.— In the Matter of LEIGH.

same under the Act *(a)*; and that upon a positive Statement of such Concealment, however much I may lament that the Party has not chosen another Tribunal, I must withhold the Certificate; but by withholding it on Allegation, I act on a doubtful Case, as if it were certain; if I grant it, I still leave those Doubts to a Course of legal Investigation. In this Case the Petitioner has proceeded at Law; but if what you state be true, the Certificate will be no Bar to you *(b)*; and I, instead of trying the Point in a Civil Action, am, upon Information and Belief, to pronounce a Judgment going Half Way to establish a capital Felony.

Mr. *Hart* said, I believe with some Truth, that if this Point should be contested in a civil Issue, or if there could be a Contest in a more solemn Manner, whether there had been a Concealment, my Allowance of the Certificate would have considerable Weight on the Minds of the Judge or the Jury to whom that Point would be submitted. And it is my Duty also to recollect, that my Act of withholding the Certificate may have also an Influence on the other Side. But I will relieve Mr. *Hart* from his Apprehension that my Opinion may have Weight upon the Point in question in another Way; for I am not here deciding what would be the Effect of these Allegations, if that was proved, of which the Petitioner says, he was informed and believes; but that Information and Belief amount to nothing, when they charge so much as the present Petition does.

Upon the Fact of the Petitioner having taken the

(a) A Concealment to the Value of £10 invalidates the Certificate, 5 *Geo.* II. c. 30. s. 7. A Concealment to the Value of £20, is a capital Felony. *Ibid.* s. 1. *Bullock's* Case, 1 *Taunt.* 71.

(b) Vincent v. *Brady*, 2 *H. Black.* 1. *Stacey* and *Federici*, 2 *Bos. & Pul.* 390.

Bankrupt

1811.
Ex parte JOSEPH.— In the Matter of LEIGH.

Bankrupt in Execution, I make no Comment; if he has done it legally, I cannot say that it has been done improperly; he must find the Comment in his own Heart and Judgment; but if by proceeding in a Course directly adverse to the Commission, he has placed himself in a Situation, in which it cannot be here examined; if having been legislatively told, that unless he waived his Proceedings at Law, he could obtain no Benefit under the Commission, he has placed himself in such a Situation, it is his own Fault. The Object of the Act, if I understand it right, (and I approve of that as of the most Part to which I gave my Consent), being that a Creditor who would not give up his Proceedings in the Action, should have nothing to do with the Commission, and have no Resource to the Great Seal *(a)*.

As to the Evidence upon which this Petition is supported, Mr. *Agar* has stated, that very great Inconvenience would arise, if the Petitioner was to disclose to the Court the Sources of his Information and Belief; but I must act where the Inconvenience is least; and I cannot set that hypothetical Inconvenience against the plain Mischief of examining a Man's Title to his Certificate, upon Evidence which would not be admissible at Law.

I have often had Occasion to observe, and I believe I am not much mistaken, that it does not belong to me, to look into the moral Life of the Bankrupt, and the Nature and Quality of his Acts before the Bankruptcy. The Legislature has left it entirely to the Caprice of Creditors, who may be under a moral, but are certainly under no legal Obligation, to sign his Certificate. It is not so with

(a) 49 *Geo.* III. c. 14. *Vide Ex parte Hardenbergh*, *Post*, p. 204. If the Creditor applies to the Great Seal, merely to supersede the Commission, or to stay the Certificate.

the

1811.

Ex parte JOSEPH.— In the Matter of LEIGH.

the Commissioners; I hold them bound, if the Bankrupt has acted conformably, to certify; and if after that, the Creditors do not bring forward any wilful Concealment, by the Bankrupt, while Bankrupt, the Great Seal is bound to allow it. I have often had Occasion to consider this Opinion, in the Case of Persons misapplying the Funds of those whose sole Support they were, holding out to them that they were safe; and when in such a Case as that, I have considered myself as not authorized in withholding the Certificate, I think I give a very strong Illustration of my Opinion on this Subject.

Then as to the undue Preference; in the first Case of *Harman* v. *Fishar (a)*, Lord *Mansfield* said, he felt a Necessity so to decide, by which I presume he meant a legal Necessity, the Act itself being a moral Act. And as to the Necessity, though the Law is well settled now between that and Contemplation of Bankruptcy, I well remember that some of the ablest Men of the Profession at that Time said, there was no such Necessity, and that it had never been heard of in Law before, but it is now quite settled; but there is no Ground here for saying there has been an undue Preference. Then as to the Cordage; he bought it at £90, and he sold it at £50, and I agree that if you can make it out, that having obtained his Certificate he was to be again in Partnership with *Hodgkinson*, and was to derive a Benefit from that Sale, that is a Concealment. But if there be nothing more than buying of the Partnership at £90, and selling it at £50, unless you make out some Residuum, in which he is to be interested in consequence of that, after his Certificate, whatever Impropriety there may be in it, I cannot say that it is a wilful Concealment.

(a) 1 *Cowp.* 117.

Now

1811.

Ex parte JOSEPH.— In the Matter of LEIGH.

Now next in regard to the Allegations as to the Furniture; this Bankrupt was indebted to the Amount of £128,000, or £130,000; and Creditors have signed his Certificate, to the Amount of £80,000 in Value, and to the Number of Forty-one. I have no Creditor whatever under the Commission, either of those who have signed the Certificate, or those who have not, who supports that Creditor who has not gone in under the Commission, or who states himself to be dissatisfied with the Bankrupt. I do not say that goes a great way in Transactions alleged to have been secret; but when I am told that these Sales took place in *Liverpool*, in the midst of all his Creditors, who had their Eyes on his Substance, and must have been aware of any material Decrease of it; and when the Bankrupt in his Affidavit pledges himself to the contrary, I am called on to do more than I think I am warranted on this Allegation.

Lastly, as to the Ship; it is said that this must be a wilful Concealment, because *Hodgkinson* is his Partner. But as it was notorious to every Body that he had Dealings with *Hodgkinson;* and when *Joseph* himself was informed of that, why am I to say it was a Concealment, and when it is known that such Partnership subsisted, the Accounts between *Hodgkinson* and the Bankrupt must bring whatever Interest the latter has therein, into the Fund for his Creditors. This Petition therefore must be dismissed, and with Costs.

In

811.

In the Matter of MORGAN.

MR. *Perry* moved for an Order on a Person of the Name of *Philips* to attend the Commissioners for the Purpose of being examined.

The Lord CHANCELLOR.

I cannot order it on Motion; his Disobedience would be no Contempt; it must be by Petition.

A Petition was afterwards presented, and the Order made.

LINCOLN'S INN HALL. 1811, *Saturday*, *Dec.* 7.

Ex parte JANE BUTTERFILL, *Ex parte* CHARLES RASHLEIGH.—In the Matter of DINGLE.

A Verdict is only *primâ facie* Evidence of a Debt, which the Creditors or the Bankrupt are at Liberty to impeach, and into the Circumstances of which, if impeached, the Commissioners are bound to enquire.

ON the 2d of *July* last, a Commission issued against *Dingle*, upon the Petition of *Jane Butterfill*, directed to Commissioners in *Cornwall*, under which he had been found a Bankrupt. At the Meeting on the 10th of *September*, for the Choice of Assignees, an Affidavit of *Rashleigh* was presented, for the Purpose of proving

The Election of Assignees, must be made by those Creditors, however few, who are in a Condition to vote. Although those, not in that Condition, might have made a different Choice.

a Deb

1811.

Ex parte BUTTERMILL, *Ex parte* RASHLEIGH — In the Matter of DINGLE.

Debt of £30,000, upon a Verdict to that Amount, obtained at the last *Cornwall* Assizes. The Commissioners refused to admit the Proof, as *Rashleigh* had not obtained Judgment, and the Consideration upon which the Debt was founded, was not stated; and the Bankrupt was present at the Meeting, and declared that he was not indebted to *Rashleigh* in any Sum whatever. The Commissioners adjourned their Meeting until the 30th of *September*, that the Opinion of Counsel might be taken.

On the 30th of *September*, *Charles Rashleigh*, by his Agent, presented another Affidavit, for the Purpose of proving the £30,000, stating it to be for Money laid out and expended. This was positively denied by the Oath of the Bankrupt; and the Commissioners refused to admit the Proof, unless *Rashleigh* would personally attend, and submit to be examined, which his Agent declared he never would do. The Commissioners then adjourned their Meeting for Three Months, to the 31st of *December*, 1811, in order, as they stated in writing delivered to the Agent, to enable Mr. *Rashleigh* to produce his Accounts, and vote in the Choice of Assignees, should his Claim be then established, or until he should have obtained the Judgment of the *Chancellor*, provided it should be taken within a reasonable Time.

The first Petition, after stating that the Estate was very considerable, and that there were numerous Creditors to a considerable Amount, competent to nominate proper Persons to act as Assignees, proceeded to state that it was necessary forthwith to recover various Debts, and to institute Enquiries respecting the Bankrupt's Property. That the Accounts between the Bankrupt and *Rashleigh* required the most minute Investigation; and that the Commissioners were desirous to proceed to the Choice of Assignees, but were apprehensive that after their former Adjournment,

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Adjournment, they could not without his Lordship's Direction, rescind their former Order of the 30th of *September* last. That *Rashleigh* had not presented a Petition, and it prayed that the *Lord Chancellor* would be pleased to direct the Commissioners to proceed to the Choice of Assignees, within Ten Days after Service of the Order, and after causing due Notice thereof to be advertised in the *Gazette:* but that if a Petition should be presented by *Rashleigh*, and that if it should appear to his Lordship to be improper to direct the Commissioners to proceed to such Choice, until the Petition of *Rashleigh* should have been heard; then that his Lordship would be pleased to appoint an early Day for the Hearing of his Petition; and if *Rashleigh* should oppose the present Petition without Effect, then that he might pay the Costs, or that they might be paid out of the Estate.

On the 29th of *November*, *Rashleigh* presented his Petition, stating the same Circumstances as to the Rejection of his Debt, and farther stating, that he had lately been informed and believed, that the Commission had been fraudulently taken out, for the sole Purpose of depriving the Petitioner of his legal Remedies, and with the concurrent Direction of the Bankrupt for that Purpose.— That the Solicitor to the Commission was the Attorney at the Time for the Bankrupt, in an Action then pending against him in the *King's Bench;* and that no Sum of Money was legally due to the petitioning Creditor. It concluded by praying that the Commission of Bankrupt issued against *Dingle*, might be superseded; or, if his Lordship were of Opinion that the Commission was valid, then that he might be allowed to prove under the same, and that the major Part of the Commissioners might be directed to advertise a Meeting of the Creditors of the Bankrupt for that Purpose, and for proceeding to a Choice of Assignees.

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By Direction of the *Lord Chancellor* both Petitions this Day came on together.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Montagu*, in support of the first Petition.

Mr. *Leach*, and Mr. *Bell*, in support of the Second.

The Lord CHANCELLOR.

I am quite clear that the Commissioners are not bound by the Verdict, if Circumstances present themselves in a credible Shape, leading them to doubt the Propriety of it; and the Judgment after the Commission is just nothing at all. Their Jurisdiction, like the *Chancellor's*, is both legal and equitable; and if there are equitable Grounds, upon which the Verdict cannot stand, they are not only authorized, but it is their Duty to enquire into them, and the Verdict will not conclude either the Bankrupt or the Creditors. It is competent to any Creditor of the Bankrupt, or to the Bankrupt himself, to impeach the Verdict, which, before it is matured into a Judgment, or Execution, is only *primâ facie* Evidence of a Debt. I can therefore give no Directions to the Commissioners to admit the Proof of this Debt, if what has been submitted to them on Oath, renders it necessary that this Examination should be had.

As to the second Point, it frequently happens that the Accounts of Creditors are in that unravelled State, that they are not prepared to establish their Proofs; but the Proceedings under a Commission are not stopped on that Ground. It is a general Rule, that the Appointment of Assignees will not be disturbed, when chosen by those who can make immediate Proof; although those who may not have been prepared so to do, would have turned

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the Scale. It is not an universal Rule, though almost an universal Rule, the Removal of Assignees being Matter of subsequent Discretion in the Great Seal. But the Choice of Assignees must proceed, because however few the Creditors may be, and taking for this Purpose *Rashleigh's* Debt to be *bonâ fide*, the Proceedings under the Commission must not be impeded.

Then as to the Point of this Commission's being fraudulent, I do not think the Evidence is sufficient. If this Woman is not a Creditor, her Debt can be examined: taking her Object to be, to get the better of this Verdict, it has been decided over and over again, that unless it be the Bankrupt's Commission, it is no Objection.

Let the Commissioners advertise a Meeting immediately, for the Choice of Assignees. Let *Rashleigh's* Petition be dismissed, without Prejudice to his proving such Debt as he can establish.

Mrs. *Butterfill* to have the Costs out of the Estate in both Petitions.

LINCOLN'S INN HALL. 1811, *Dec.* 6.

MUMFORD *v.* RANDALL.

Plaintiff becomes Bankrupt. Upon Motion to dismiss the Bill for want of Prosecution, Assignees allowed a Month's Time to adopt the Suit, at the Expiration of that Time Defendant to apply again.

MR. *Agar* moved, upon Notice to dismiss a Bill for want of Prosecution; the Plaintiff had become Bankrupt.

Mr. *Heald*, for the Bankrupt, opposed the Motion.

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Said, the Course he should adopt would be to give the Assignees a Month to proceed in the Suit, by filing a supplemental Bill, if they thought proper, and if they did not do so in that Time, the Defendant might again apply *(a)*.

(a) Ex Relatione. Vide Monteith v. *Taylor*, 9 *Ves.* 616. *Sellers* v. *Dawson*, *Dick.* 738. *Ex parte Berry*, 1 *Dick.* 81. *Hall* v. *Chapman*, 1 *Dick.* 348. *Rutherford* v. *Miller*, 2 *Anstr.* 458. *Davidson* v. *Butler*, *Co.* B. L. 545. *Williams* v. *Kinder*, 4 *Ves.* 387. On the Bankruptcy of a Petitioner his Assignees must prefer a new Petition, *Ex parte Rattray*, *Cooke* B. Laws, 546.

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1 Rush Lit. 396
1 Jacob. 397.

BRANDON *v.* ROBINSON AND DAVIES.

LINCOLN'S INN HALL. 1811, *December.*

A Testator directs that his Estate and Effects shall be laid out in the Public Funds, in the Names of Trustees, who are to pay the Dividends,

STEPHEN Goom, by his Will, bearing Date the 1st of *August*, 1808, devised and bequeathed to the Defendants, *Robinson* and *Davies*, all his real and personal Estate upon Trust, to sell and dispose of the same; and after Payment of his Debts, and some few Legacies, upon Trust to divide the Residue of the Produce of such Sale, amongst his Children, *Thomas Goom*, *William Goom*, *Mary Wright*, *Esther Fuller*, *Elizabeth Goom*,

from time to time, into his Son's Hands, or to his Order and on his Receipt; to the Intent that the same, or any Part thereof, should not be grantable or assignable, by way of Anticipation. On the Bankruptcy of the Son, his Assignees under the Commission are entitled to this Interest under the Will.

P 2

6 S. R. Lewis v. Lewis 306 *Stephen*

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Stephen Goom, and *Margaret Goom*; and he directed that the eventual Share and Interest of his Son *Thomas Goom*, of and in his Estate and Effects, should be laid out in the Public Funds, or on Government Securities at Interest, by and in the Names of his Trustees during his Life; and that the Dividends, Interest, and Produce thereof, as the same became payable, should be paid by them, from time to time, into his own proper Hands, or on his proper Order and Receipt, subscribed with his own proper Hand; to the Intent that the same should not be grantable, transferrable, or otherwise assignable, by way of Anticipation of any unreceived Payment or Payments thereof, or of any Part thereof; and that upon his Decease, the principal of such Share, together with the Dividends and Interest, and Produce thereof, should be paid and applied by his Trustees, unto and amongst such Person or Persons, as in a Course of Administration would be entitled to any personal Estate of his said Son *Thomas Goom*, and as if the same had been personal Estate belonging to his said Son, and he had died intestate.

The Testator died shortly after the Date of the Will.

On the 15th of *June*, 1811, a Commission of Bankrupt issued against *Thomas Goom*, under which the Plaintiff was the surviving Assignee. The Bill prayed, that the Will might be established; that the clear Residue of the Estate and Effects might be ascertained; and that the Plaintiff might have the Benefit of such Part, as in the Character of Assignee he should be found entitled to. To this Bill there was a general Demurrer, that the Plaintiff had no Right or Title.

Mr. *Hart*, and Mr. *Horne*, in support of the Demurrer, cited and relied on *Dommet* v. *Bedford*, 3 *Ves.* 149. 6 T. R. 684. *Shee* v. *Hale*, 13 *Ves.* 404.

Mr.

Mr. *Leach*, and Mr. *Roupell*, in support of the Bill, mentioned *Goring* and *Warner*, 7 Viner Abridg. 85 *(a)*.

The Lord CHANCELLOR.

Without Doubt a Testator may limit his Property, until the Object of his Bounty shall become Bankrupt; but it is equally clear, that if he give it for Life, he cannot take away the Incidents to that Estate. The Difference is very great between giving an Interest to a Person while he shall remain solvent, and then over; and giving it for Life. If there be a Limitation over in the Event of Insolvency or Bankruptcy, then neither the Person so becoming Bankrupt or Insolvent, nor his Assignees, can take any Benefit beyond the Terms of the Will. In the Case which arose upon Lord *Foley's* Will *(b)*, it was argued, and I thought admitted, that if the Estate went

(a) *Dommet* v. *Bedford*, was an Annuity for Life (charged on real Estates, devised subject to the Annuity) to *cease* on Alienation: held that the Bargain and Sale under a Commission of Bankrupt, was such an Alienation as determined the Annuity. 3 *Ves.* 149. 6 T. R. 684. *Shee* v. *Hale*, was an Annuity with a Condition *to fall into the Residue*, upon signing an Instrument agreeing to sell, assign, charge, or dispose of the same, or any Part thereof; it was held to be forfeited by the Annuitant's taking the Benefit of an Insolvent Act: and it was said, by the *M. R.* to differ from the Case of a Bankrupt; as an Insolvent Debtor is not compelled to take the Benefit of the Act. 13 *Ves.* 404. In *Goring* v. *Warner*, Lord *Macclesfield*, C. held that the Assignment by the Commissioners, was no Breach of a Proviso in a Lease not to assign without the Consent of the Lessor. 7 *Vin.* Abr. 85. That the Commissioners cannot assign a Lease in which there is a Covenant to be *void* in case of Bankruptcy. *Vide* *Roe* v. *Galliers*, 2 T. R. 133. *Vide etiam* *Doe* v. *Clarke*, 8 *East.* 185; and *Doe* v. *Carter*, T. R. 57. 300.

(b) 6 *Ves.* 364.

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to the Sons as Property in them, all the Consequences must attach.

In regard to Property given to the separate Use of married Women, the Directions originally were, that the Money was to be paid into their proper Hands, and their Receipts alone to be a Discharge; it was held that a married Woman might dispose of Property so given to her, and that her Assignee might take it, as this Court would compel her to give her own Receipt, in affirmance of her own Contract. In Miss *Watson's* Case, the Words, and not by Anticipation, were introduced by Lord *Thurlow:* his reasoning was this; I do not hereby take away any of the Incidents of Property at Law; this Interest which a married Woman is suffered to take, is a Creature of Equity, and Equity may modify the Power of Alienation.

But it is quite different if the Power is for Life; supposing that the Bankrupt makes out, that he never has an Interest, till he attends personally; the Act of his Receipt being absolutely necessary: yet if he was never to attend, or to give that Receipt, and Arrears were to accumulate, it is clear that those Arrears would be Assets for his Debts. It is not enough that the Testator has said, the Fund shall not be transferred; in order to prevent that, it must be given over to somebody else. Unless therefore by Implication, it falls into the Residue, it is an equitable Interest, to which the Assignees are entitled.

Bequest to *A.* and on his Death to his next of Kin in a Course of Administration, does not vest the Property absolutely in *A.*; but after his Death in his next of Kin, as designated Objects of the Testator's Bounty.

As to the principal Fund after the Death of the Bankrupt the Conclusion is different; the Intention of the Testator is, "this is my Gift, my personal Estate," not that of the Bankrupt's; to go as my Property to certain Persons whom I point out by the Description of his, the Bankrupt's, next of Kin. This Demurrer must be overruled.

Ex

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Ex parte RUTHERFORD.—In the Matter of ASHLEY.

Under a separate Commission, the separate Estate is entitled to be re-imbursed out of the joint Estate, Expences incurred in recovering Property for the Benefit of the joint Creditors.

ASHLEY, the Bankrupt, carried on Business on his separate Account as a Pawnbroker; and was also concerned in a Variety of Mercantile Dealings, with one *Bell*, who, under a Commission for that Purpose, had been found a Lunatic. The separate Estate of *Ashley* was inconsiderable; but the joint Estate of *Ashley* and *Bell*, consisted of an Investment of Goods, sent out by them to *Spain*, to the Value of near £10,000. The whole of this Property was at the Time of *Ashley*'s Bankruptcy warehoused and unsold at *Cadiz*. The Assignees of *Ashley* had obtained Possession of these Goods, and converted them into Money. The joint Creditors of *Ashley* and *Bell* had applied for and obtained an Order to prove their Debts; and that the joint Property might be applied for their exclusive Benefit.

Much Investigation of the joint Dealings and Transactions of *Ashley* and *Bell*, had taken place before the Commissioners, which, it was alleged, had no Reference whatever to the separate Estate of *Ashley*; and the Assignees had also been at a very great Expence in obtaining Possession of, and realizing the Property of *Ashley* and *Bell*.

This Petition, presented by one of *Ashley*'s separate Creditors, prayed a Reference to the Commissioners to take an Account of the Costs and Expences incurred in the Issuing and Prosecution of the Commission; and that they might ascertain what Expences had been incurred and Monies advanced, out of the separate Funds, for the exclusive

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exclusive Benefit of the joint Estate; and that the same might be ordered to be refunded out of the joint Estate; and that the Commissioners might also be ordered to apportion the Costs and Expences, in the Issuing and Prosecution of the Commission, and direct the same to be paid.

Sir *Samuel Romilly*, and Mr. *Roupell*, in support of the Petition.

Mr. *Montagu*, for the joint Creditors.

Mr. *Cooke*, (*Amicus Curiæ*,) said, that the Expences of a separate Commission are defrayed out of the separate Estate; and all Enquiries for the Benefit of the joint Creditors, out of the joint Estate.

The Lord CHANCELLOR.

Then whatsoever Expence the Assignees, under this separate Commission, have been *bonâ fide* put to, in getting in the joint Property, must be paid them out of the joint Funds.

Hilary Term. 1812, *Jan.* 27.

Ex parte BRADLEY.—In the Matter of TOWNSEND.

The Great Seal has Jurisdiction after the Bankrupt has passed his last Examination, to compel him to deliver up Papers in his Possession belonging to the Estate, and to attend before the Commissioners.

THE Object of this Petition was, that the Bankrupt might be directed to deliver up certain Papers in his Possession, relating to his Estate, which had been delivered to him by an Assignee who had subsequently

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been removed, and to attend the Commissioners for the Purpose of being examined: he had passed his last Examination.

Mr. *Montagu*, in support of the Petition, cited *Ex parte Stevens*, before Lord *Eldon*, C. in 1808 *(a)*.

The Bankrupt in person, opposed the Petition.

The Lord CHANCELLOR.

This Commission issued in 1805, and has been in Operation ever since, and I have made several Orders under it; it is therefore not enough now to say, that because Mr. *Townsend* has Ground to dispute the Act of Bankruptcy, I am to consider the Commission as nothing. Mr. *Townsend* complains of the Conduct of the Commissioners; I give no Opinion as to the Truth of the Case stated by him, but for the Purpose only of considering whether the Prayer of the Petition ought to be granted, I will suppose the whole of the Allegation of Mr. *Townsend* to be true. The Question comes to this, whether I can refuse to make an Order on Mr. *Townsend* to deliver up these Papers, or to order him to attend the Commissioners, his last Examination being past. I am of Opinion I cannot so refuse. If the Court had not the Power of compelling the Attendance of the Bankrupt after his last Examination, it must proceed on very different Grounds from what it has hitherto done, in allowing the Certificate. I am aware of having weighed well, in the Case cited by Mr. *Montagu*, and in other Cases, the Authority under which the *Chancellor* acts in Bankruptcy,

(a) Ex parte Stevens, with a Note of which I have been favoured by Mr. *Montagu*, is the Case reported as *Anonymous*, in 14 *Ves.* 450.

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in Circumstances not specially provided for by the Statutes; and I am convinced, that it was the Intention of the Legislature, in giving Jurisdiction to the *Chancellor* in Bankruptcy, to give him Power to use in Bankruptcy the Authority used in Causes in *Chancery*, where no specific Authority is given by the Statutes. In this Lord *Hardwicke* supports me. I will not presume Disobedience in Mr. *Townsend;* if there should be, I must perform the disagreeable Duty of committing him. I am therefore bound to make this Order; Mr. *Townsend* will always have access to his Papers, for the Purposes of justice. If he has a Right to have his Commission superseded, he must apply in the regular Way, and will meet the Justice that is due to him *(a)*.

(a) Ex Relatione.

Hilary Term. 1812, *Jan.* 29.

By the 49 *Geo.* III. c. 121. s. 14. a Person having two Debts cannot come in under the Commission for one and proceed at Law for the other. If a Creditor who is proceeding at Law present a Petition that a Commission may be superseded, or if it shall be found to be valid, that new Assignees may be chosen, and that he may be admitted to prove, he brings himself within the Jurisdiction of the Great Seal, and will be enjoined from proceeding at Law. *Quære*, If the Object of his Petition merely was that the Commission might be superseded, or the Certificate stayed. Costs given under the Word Expences though not specifically prayed.

Ex parte HARDENBERGH.

THIS was the Petition of the Bankrupt, to be discharged out of the Custody of the Warden of the *Fleet*, at the "Expence" of a Person of the Name of *Laffert*. In *Easter* Term, 1811, *Hardenbergh* had obtained a Rule in the *Common Pleas*, to set aside an

Award

Award which, under a Rule of Court, had been made in favour of *Laffert* for £200. On the 24th of *May*, the Rule was discharged with Costs. On the 1st of *June*, these Costs were taxed, at £5 : 8*s*. On the 8th of *June*, the Commission issued; and on the 14th of *January*, *Laffert* charged the Bankrupt in Execution, upon an Attachment for Non-payment of them.

The Bankrupt had obtained his Certificate; but while it was lying before the *Lord Chancellor* for Allowance, *Laffert*, who had entered up Judgment on his Debt of £200, and had not gone in under the Commission, presented a Petition impeaching the Commission, and praying that it might be superseded, or if it should be found to be valid, that a certain Debt might be expunged, that there might be a new Choice of Assignees, that he might be permitted to prove, and that the Certificate might be stayed. Upon this Petition the *Lord Chancellor* made an Order *(a)*, directing an Enquiry before the Commissioners into the Validity of the Commission.

Mr. *Wetherell*, and Mr. *Parker*, in support of the Petition, contended, that although *Laffert* had not actually proved under the Commission upon his original Debt of £200, yet he by presenting the Petition had virtually come in under it. That if the Amount of this Taxation could be considered as distinct from the Sum of £200, yet *Laffert* could not, as the Law now stood *(b)*, having had Recourse to the Great Seal for one Debt, proceed at Law for the other. This being a second Application of a similar Nature, they hoped the Order would be made with Costs.

Sir *Samuel Romilly*, and Mr. *Montagu*, *contra*.

(a) Vide p. 181, *ante*. *(b)* 49 *Geo.* III. c. 121. s. 14.

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Ex parte HARDENBERGH.

The Lord CHANCELLOR.

These are Costs giving by the Court of *Common Pleas*, upon an ineffectual Attempt by the Bankrupt, to set aside an Award; they constitute a distinct substantive Debt; and it becomes necessary to ask, whether under the Circumstances which have taken place, *Laffert* has a Right, by this Mode, to enforce the Payment of it. Now, before the late Act *(a)*, if your Debts were in a different Right, or of a distinct Nature, you might come in under the Commission for one, and proceed at Law for the other; but the Act has now settled that *(b)*. There is not in this Case the Difficulty which has been urged upon the Point of Jurisdiction, whether if a Creditor comes here, merely to remove the Commission or Certificate, out of the Way of his proceeding at Law, I should consider him as coming in under the Commission, and restrain him from proceeding at Law: for in this Case the Creditor goes further, he prays an Enquiry into Circumstances impeaching the Validity of the Commission, with a View to supersede it; or in case the Commission should not be superseded, that there may be a new Choice of Assignees, and that he may be admitted to prove. Now it seems exceedingly clear, that pending this Enquiry, he himself proposing it, he must abide by the Alternative, and stop till the Result is ascertained. The Order must therefore be made upon him, and with Costs.

Sir *Samuel Romilly* objected, that under the general Rule, Costs not being prayed in the Petition, they could not be given.

The Lord CHANCELLOR.

It prays Expences.

(a) 49 *Geo.* III. c. 121. s. 14. *(b)* *Ante*, p. 98.

Ex

Hilary Term. 1812, *Jan.* 29.

Ex parte ———.

Whenever two of three Assignees direct the Solicitor to be changed; the third not concurring, has a Right to know, whether such Change will be beneficial, and he not appearing on a Petition for that Purpose, the Order was made.

IN this Case, two out of three Assignees, with the Concurrence of the Creditors of the Bankrupt, had directed the Solicitor to the Commission to give up the Proceedings to another; and that Direction not having been complied with, they preferred the present Petition to enforce it. There was no Charge or Imputation of Misconduct. Subsequent to the filing of the Petition, the Solicitor had consented to give them up, upon some Arrangement as to his Costs, which not having been concluded, the Petition now came on to be heard.

Mr. *Heald*, in support of the Petition, cited *Ex parte Scruby (a)*.

Sir *Samuel Romilly*, and Mr. *Cooke*, *contra*:

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(a) *Ex parte* SCRUBY, and ANOTHER.—In the Matter of STAMFORD *(a)*.

Hilary Term, 1809.

This was a Petition of two Assignees, being the major Part in Number in Value, against the third; it stated their Dissatisfaction with the Conduct of the Solicitor to the Commission, and their Desire to appoint another; but that *Kirby*, the third Assignee, had refused to concur with them, in an Order to direct the Solicitor to deliver up the Proceedings; and that they had also applied to the Solicitor, offering to pay his Bill, but he had refused to comply: it prayed an Order for the delivering up of the Commission and the Proceedings, undertaking to pay the Costs settled by the Commissioners to the Choice of Assignees, and that either the Solicitor or *Kirby* might pay the Costs of the Application.

Sir *Samuel Romilly*, and

(a) From a MS. Note of Mr. *Montagu*.

Mr.

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Ex parte ——.

The Lord CHANCELLOR.

When two Assignees agree that Proceedings shall be handed over to another Solicitor, and a third differs, he has a Right to know whether such Change will be beneficial. He not appearing on this Occasion, leaves no Doubt what is to be done; whatever therefore are strictly speaking Proceedings, must be given up, and without any Qualification as to Costs, because there can be no Lien upon them. To any thing, which are not considered as Proceedings, this Order will not extend. There can be no Difficulty between these Gentlemen in settling the Costs: I shall not, under the Circumstances give any upon this Application; and the Order, if it be necessary to take out an Order, must be to give up the Proceedings.

Mr. *Montagu*, in support of the Petition.

Mr. *Johnson*, *contra*.

The Lord CHANCELLOR.

The Proceedings in Bankruptcy must not be delayed by these Disputes between Assignees; nor must the Bankrupt's Estate be burthened by Costs occasioned by such Disputes. Take the Order according to the Prayer of the Petition, and let the third Assignee pay the Costs.

LINCOLN'S INN HALL. Sittings after *Hilary Term.* 1812, *Feb.* 22. 25.

Ex parte SMITH.—In the Matter of SMITH.

Devise of Copyhold Estates to the Wife of *A.* to be disposed of as she should appoint; and a Bequest of 200 Guineas to pay the Fines of her Admission, the Surplus to herself. She is not admitted, but appoints to her Husband, who is the residuary Legatee, and gives her Credit for the 200 Guineas in account. He becomes Bankrupt. Held, that the 200 Guineas, not having been applied for the Purpose of Admission, fell into the Residue; and that the Credit in account was a mere Declaration of trust without Consideration, and not binding upon his Creditors.

BY his Will of the 9th of *August*, 1782, *Thomas Mulliner* devised several Copyhold Estates, to *Samuel Kilderbee*, his Heirs, and Assigns, in trust for

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the sole Use of the Petitioner *Juliet Smith*, the Wife of the Bankrupt, to be disposed of as she should direct or appoint; and he also bequeathed to the said *Samuel Kilderbee*, the Sum of 200 Guineas, for the Payment of the Fines and Fees, that should be due and payable, on her Admission to the Estates; and he directed that the Surplus of the 200 Guineas, if there should be any, after the Payment of the Fines and Fees, should be paid into the Hands of the Petitioner, for her separate Use; and he bequeathed the Residue of his personal Estate to the Bankrupt, and appointed him his Executor.

Juliet Smith never was admitted to the Copyhold Estates; but she by Deed appointed *Kilderbee* to stand seised of them in trust, to be conveyed to the Use of the Bankrupt, his Heirs, and Assigns; but she did not by that Appointment, nor by any other, give the 200 Guineas, or any Part of them to her Husband.

There was an Account Current between the Bankrupt and the Petitioner, commencing on the 26th of *August*, 1786, long before the Bankruptcy, which Account was admitted by the Commissioners, and in which he had given her Credit for the 200 Guineas. The Bankrupt had been admitted to the Copyhold Estates, and the Fines and Fees of his Admission, amounting to £180, had been paid by him. The Petitioner had not been paid her 200 Guineas, and the Commissioners had refused to admit her Proof. The Object of the present Petition was that it might be admitted.

Mr. *Montagu*, in support of the Petition, contended, that under the Word Surplus, the Petitioner was entitled to so much of the 200 Guineas, as had not been actually exhausted, by the Purpose to which it was applicable.—That the Bankrupt in 1784, gives his Wife Credit in the Account between them, for that Sum, which he thereby considers

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considers as being vested in her. Unless the Statutes of *James* interferes, the Assignee is bound by the same Equity as the Husband; and it has been decided in *Ex parte Shorland*, 7 *Ves.* 88, that Money is not within the Statute *(a)*.

Mr. *Richards*, for the Assignees, contended that the 200 Guineas having been given for a special Purpose, to which they had not been applied, had fallen into the Residue, and were the Property of the Husband; that the Petitioner could not take them as the Gift of her Husband against his Creditors.

The Lord CHANCELLOR

Having stated the Case, said, the 200 Guineas are given for the Purpose of paying the Fines, upon the Petitioner's Admission to the Copyhold Estates; and the Surplus to herself. The first Question is, whether she is entitled to demand them for a Purpose to which it is impossible to apply it? Mr. *Montagu* felt the Difficulty of this, and confined his Argument to the Word Surplus, concluding that in that View she might be entitled to all that was not exhausted, by the Purpose for which it was given. But a Surplus never could arise, except from an actual Application of the Fund to that Purpose. I still agree to the Case of *Ex parte Shorland (b)*; but I can make no more of this, than that the Husband being residuary Legatee, raises an Account in which he gives his Wife Credit for these 200 Guineas. He is a Trustee for that Sum, without any Consideration, and the Money never having passed, it is in his Hands upon a Declaration that will not bind Creditors. Petition dismissed.

(a) Stat. 1 *Jac.* I. c. 15. s. 5.

(b) The Point in *Ex parte Shorland* was, that a mere Gift of Money by a Bankrupt to his Son, is not within the Stat. 1 *Jac.* I. c. 15. *Vide* 7 *Ves.* 88.

END OF THE SECOND PART.

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CASES

IN

BANKRUPTCY, &c.

Ex parte BEAN.

1810, *May* 18.

17 *Ves.* 47, 48.

A PETITION was presented by a Bankrupt, that his Commission should be superseded, upon the usual Certificate of the Consent of all the Creditors who had proved Debts under it; but the Certificate further stated, that the Bankrupt had not passed his last Examination, and that he was then in Custody under a Commitment by the Commissioners, for not answering to their Satisfaction.

Bankrupt cannot supersede his Commisson with Consent of all the Creditors, while under Commitment by the Commissioners.

The Lord CHANCELLOR

Refused to make the Order; observing that it was settled, that a Bankrupt could not supersede his Commission, until he had surrendered (*a*): and being under Commitment for not answering to the Satisfaction of the Commissioners, he must be considered as guilty of a great Offence.

Bankrupt cannot supersede his Commission before Surrender (*a*).

(*a*) *Ex parte Jones*, 11 *Ves.* 409. *Vide* an Exception to this Rule, *Ex parte Hopkins*, *post*, 228.

1810,
June 13.

Ex parte KING.

17 *Ves.* 115. 117.

Under a joint Commission of Bankruptcy, the separate Estate of One Partner, has a Lien on the other's Share of a Surplus of the joint Estate, in respect of a Debt proved under Bills drawn in the Name of the Firm for a separate Debt; and may come in with the other separate Creditors for the Deficiency.

A JOINT Commission issued against *Joseph King* and his Brother; under which Three Bills of Exchange, drawn by *Joseph King*, in the Name of the Firm for his separate Debt, had been proved. This Petition, presented by the separate Creditors of the Brother, claimed a Lien in respect of that Proof, upon *Joseph*'s Share of the Surplus of the joint Estate.

Mr. *Cooke*, in support of the Petition, cited *Goss* v. *Dufresnay* (*a*).

Sir *Samuel Romilly*, for the separate Creditors of *Joseph King*, insisted that there could be no Lien for a Debt from one Partner to another.

The Lord CHANCELLOR.

I think this Lien ought to prevail; and if the Surplus of the joint Estate should not be sufficient to pay all that is due from one Partner to the other, he ought to come in with the separate Creditors of the other. The separate Creditors of the one can have nothing but what he could have; and his separate Estate, is that Part of the Partnership Effects, which shall remain after the Demands of his Partner upon the Partnership are satisfied. The Right of one Partner in respect of these Bills may be met by

(*a*) *Davies*, 371. *Cooke*'s B. L. 528. *Taylor* v. *Field*, 4 *Ves.* 396. 15 *Ves.* 569. See the Note to *Dutton* v. *Morrison*, *post*, 218.

other

other Circumstances; as if he had not brought in his Proportion of Capital: unless some Enquiry upon that Head is desired I shall make the Order.

1810.
Ex parte
KING.

The Order was made.

DUTTON *v.* MORRISON.

17 *Ves.* 193. 211.

1809,
Feb. 27, 28.
May 8.
1810,
July 24.

Assignment by Partners by Deed of all their Property, in Trust for their Creditors, with a Proviso to be void, if all the Creditors for above £20 should not execute, or a Commission of Bankrupt should issue within a certain Time, is an Act of Bankruptcy: *secus*, when the Deed being joint and not several One never executed.

The Interest of each Partner, is his Share of the Surplus, subject to all the Partnership Accounts; and that Interest only is liable to the Execution of a Creditor. By the Bankruptcy of One, his Interest is devested, and vests in the Assignees, by Relation to the Act of Bankruptcy. Therefore joint Creditors, under Judgment in foreign Attachment of the same Date with the Commission, but subsequent to the Act of Bankruptcy, cannot have Execution against the joint Property; which must be applied among all the joint Creditors.

RUMBOLD, Dutton, and *Houghton*, Merchants and Co-partners, called a Meeting of their Creditors, and by Indentures, dated the 17th of *December*, 1806, assigned to Trustees certain Goods and Merchandizes, (proved to be all their Property,) upon Trust to pay their Creditors, Parties to the Indenture. The Deed contained a Proviso, that in case all the joint Creditors whose Debts amounted to upwards of £20, should not execute it by the Time therein mentioned, or a Commission of Bankrupt should issue in the mean Time, the Indenture should be void.

1809-10.
DUTTON
v.
MORRISON.

This Deed was executed by *Rumbold*, but one of the Partners never executed it. Certain Creditors to the Amount of upwards of £20, who had not executed it, attached in the Court of the *Lord Mayor* the Property in the Hands of *Dutton*, the Trustee, and on the 10th of *May*, though Notice was served on them that a Docket had been struck and a Commission would issue on an Act of Bankruptcy prior to their Attachments, obtained Verdicts in the Attachments, and entered up Judgment. On the same Day a Commission of Bankrupt issued against *Rumbold* alone, and he was declared a Bankrupt, the Act of Bankruptcy being the Execution of the above Indenture of Assignment.

The Bill was filed by the Trustees in the Deed, and the provisional Assignee under the Commission; stating the Bankruptcy of *Rumbold*, and the Absence from the Kingdom of the other Partners; and praying an Injunction against Execution under the Attachments, and that the Trust Money might be paid into Court, or to the provisional Assignee, for the Benefit of the joint Creditors.

Mr. *Hart*, and Mr. *Roupell*, for the Plaintiffs. Sir *Samuel Romilly*, and Mr. *William Agar*, for the Defendants.

The first Question was, whether the Indenture, not being a fraudulent Conveyance, nor executed by one of the Parties to it, and containing a Proviso to make it void in case all the Creditors to the Amount of £20 omitted to execute within the Time, or a Commission should issue, was an Act of Bankruptcy.

The Lord CHANCELLOR.

The Act of Bankruptcy in this Case, if it is One, must be

be that which is described by the Statute of King *James* (*a*): The making of "any fraudulent Grant or Conveyance of "his Lands, Tenements, Goods, or Chattels, to the In-"tent, or whereby his Creditors shall or may be defeated "or delayed for the Recovery of their Debts." Assuming for a Moment this Instrument was executed by the Three, and that it comprehends the whole, or nearly the whole of their Estate and Effects, it would be very improper to intimate any Doubt, that it is now to be considered perfectly settled, that such an Instrument, though not a fraudulent Grant at Common Law, is an Act of Bankruptcy (*b*). Nor will the Condition, that it shall be void, if a Commission of Bankruptcy be taken out, or if all the Creditors do not sign within a given Period, make it less an Act of Bankruptcy than it would have been if the Condition had not been inserted.

With regard to the Fact that this was intended to be a joint and several Deed; the Question is, whether within the Principles of the Decisions, this Deed is an Act of Bankruptcy, attending to the true Intent and Effect of it taken altogether; to what was intended to be done; and what as not intended, if the whole that was intended, was not capable of being done. Admitting that this was not intended to be a several Deed; but that the Creditors through the mutual Agreement of all, were to derive a Benefit against each; if Two retired from that Agreement,

(*a*) Stat. 1 *Jac.* I. c. 15. s. 2.

(*b*) *Gayner*'s Case, 1 *Burr.* 477. *Worseley* v. *De Mattos*, 1 *Burr.* 467. *Wilson* v. *Day*, 2 *Burr.* 827. 4 *Burr.* 2239. *Butcher* v. *Easto*, 4 *Doug.* 282. *Hassel* v. *Simpson*, 1 *Bro. C. C.* 99. *Doug.* Ed. 11, 89, *n.* 1 *Cooke*'s B. L. 88. *Kettle* v. *Hammond*, *Ibid.* 89. *Harman* v. *Fisher*, *Cowp.* 117. But those who execute the Deed cannot set it up as an Act. *Bamford* v. *Baron*, 2 T. R. 594

and

1809-10.

DUTTON v. MORRISON.

and no Bankruptcy had occurred, could the Creditors have taken the Advantage of the Deed against the one who executed, but who did not mean to execute so as to give the Deed any Effect, unless the others devoted their Shares of the Property to the same Purpose? I doubt whether that would be the legal Effect. Has the Act any Effect, preventing his continuing a Trader, or dedicating his Property to any Purpose whatsoever? If the Instrument had been delivered as an Escrow, there could be no Doubt. I am unwilling to decide this Question myself, and unless there are other Acts of Bankruptcy, a Case ought to be directed.

Affidavits were produced, of other Acts of Bankruptcy, in *October* 1803: it now came on upon the other Question, of the Validity of the Attachment. *Barker* v. *Goodair* (*a*) was relied on.

The Lord CHANCELLOR.

The Question is, what is the Effect of the Commission, the Attachments under which Verdicts of even Date have been obtained, and the preceding Act of Bankruptcy committed by this one Partner. Whether the attaching Creditors, who have succeeded upon the Plea of *nil debet* in the *Mayor's Court*, can find in the Hands of the Plaintiff *Dutton*, that Property of the Three Partners, against which they can have Execution entirely as the Property of the Three; or if not to be considered as the Property of the Three, Property to which the Title is such as among

(*a*) *Barker* v. *Goodair* was a Case raising the same Point as the present, in which the Court upon Motion granted an Injunction, merely with the View of preserving the Property for the Party, in whose favour it might ultimately decide. 11 *Ves.* 78. In *Bristow* v. *Potts*, a similar Case, Lord *Loughborough* would not grant the Motion. *Ibid.* 81.

the Three, that such a Creditor can take, if not the Whole, a Part of it?

The Act of Bankruptcy, in *October* 1805, severs the Property of the Bankrupt from the Property in the Partnership. From that Moment, the Partnership Effects were the Property of the Two solvent Partners, and if a Commission was afterwards taken out, of the Assignees. The Effect of that Commission, if taken out before the Execution, or after it upon a previous Act of Bankruptcy, is, that a Part at least, of the Property taken under the Execution, would, in the latter Case by relation, be the Property of the Assignees: and here it is material to observe, that my Opinion differs from that of Lord *Loughborough*, who thought that the Bankruptcy of one Partner only would not, though founded upon a preceding Act of Bankruptcy, affect the Attachment. I do not agree to that: my Opinion is, that if after an Execution against one Partner, a Commission of Bankruptcy issues against him upon an Act of Bankruptcy antecedent to the Execution executed (*a*), whatever may have been taken under the Execution, becomes by relation the Property of his Assignees, at the Time of that Execution executed, and not of the Bankrupt himself; the Commission by relation devesting his Interest.

What then is to be the Case of these Creditors, who having Attachments against the Property of these Three Partners while it was their Property, did not obtain Execution, until a Commission issued against One of them, upon an Act of Bankruptcy antecedent to the Attachments, by relation therefore devesting the Property of

(*a*) By 49 *Geo.* III. c. 121, s. 2, Executions and Attachments executed more than Two Months before the Commission are valid, notwithstanding a prior Act of Bankruptcy, unless the Person suing out the Execution, &c. had Notice of such Act.

that

1809-10.

DUTTON v. MORRISON.

that One? It is very difficult to maintain, that the attaching Creditors can take the Property of the Two remaining Partners, though they might take the Property of the Three, or of each. But admitting that they could take the Property of the Two; what is it that they can take? Is it more than what will appear to be the Property of the Two, after an Account of the Estate of the Three has been taken, and the joint Demands upon them have been settled (*a*)? This has been long established in Equity. There is infinite Difficulty in it: but it appears to me, that notwithstanding these Attachments, under the particular Circumstances, the joint Estate must be applied among all the joint Creditors, as well the attaching Creditors as the others. The Bankruptcy making One-third of this Property the Property of the Assignees, the Question is, whether the Creditors by Attachment, though they have Judgment, can take out Execution; and my Opinion is, that Execution under the Attachment cannot go against the Property of the Two, if it could go against the Property of the Three, and of each; and that this is Property, which must be applied among all the joint Creditors, exactly as the Application is made in Bankruptcy.

(*a*) *Fox* v. *Hanbury, Cowper*, 445. In *Parker* v. *Parker*, and *Chapman* v. *Koops*, 3 *Bos.* & *Pul.* 288. The Court of *C. B.* would not interfere, to confine the Execution to the actual Interest of the Partner; but referred the other Partners, to their Relief in Equity against the Vendee of the Sheriff. The Rule stated in the Text, applies in Equity, to a Purchaser of a Partner's Interest; to his next of Kin or Executors; to his Creditors suing out Execution; to his Assignees in Bankruptcy; *Taylor* v. *Fields*, 4 *Ves.* 396. And to a Creditor taking an Assignment of joint Property for a separate Debt. *Young* v. *Keighly*, 15 *Ves.* 557. *Ante*, *Ex parte King*, 212.

Ex

Ex parte LOBBON.

1810, *March* 29.

17 *Ves.* 334, 335.

Bill, after Proof under a Commission against the Acceptor, was paid by the Drawer; who, after a Dividend, having arrested the Bankrupt for the Balance, and being also a Surety for him on another Bill, was ordered to discharge him, and restrained from lodging any Detainer under the 49 *Geo.* III. c. 121. s. 8 & 14.

A COMMISSION issued against the Petitioner in *April* 1809, under which a Bill of Exchange, accepted by him, was proved by the Indorsee, who afterwards received the Amount from the Drawer. The Drawer, after a Dividend of Three Shillings in the Pound, in *January* 1810 arrested the Bankrupt for the Balance. The Bankrupt, who had not obtained his Certificate, was also liable to the same Person as Surety upon another Bill, which had not been, though it might have been, proved under the Commission. The Assignees held Funds sufficient, without disturbing the Dividend made. The Petitioner prayed that he might be discharged at the Suit of the Drawer, and that he might be restrained from proceeding at Law against him upon the other Bill.

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Petition.

Mr. *Hart*, for the Creditor.

The Lord CHANCELLOR.

This Case appears to me to fall within the Two Clauses of the Statute (*a*). This Creditor was liable for a Debt of the Bankrupt; and I know these Words "or be liable "for" were added for the very Purpose of embracing this Sort of Case. Being liable, he must take the Benefit of the Proof made by the Holder of the Bill, and consequently cannot hold the Arrest.

Ordered as prayed.

(*a*) 49 *Geo.* III. c. 121. s. 8 & 14.

Ex

1811, *May* 29.

Ex parte LANCHESTER.

17 *Ves.* 512, 513.

The *Lord Chancellor* refused to stay Proceedings under a Commission *not opened*, upon an Allegation that there was no petitioning Creditor's Debt: the Commission and the *Adjudication* of Bankruptcy being a Matter of Right under the Act of Parliament.

THE Object of this Petition was to stay Proceedings under a Commission which had not been opened, insisting, that there was not a petitioning Creditor's Debt.

Mr. *Hart*, in support of the Petition, mentioned *Ex parte Foster* (*a*).

Mr. *Montagu, contra*, cited *Ex parte Stokes* (*b*).

The Lord CHANCELLOR.

There is no Doubt, that any Person striking a Docket, and giving the Bond to the *Lord Chancellor*, as required by the Act of Parliament, has a Right to take out a Commission of Bankruptcy, and to have the *Adjudication*, if the Trading, the Act of Bankruptcy, and the petitioning Creditor's Debt are proved; and there is no preventive Remedy. Compensation must be sought, if the Commission should have been taken out without Foundation, by an Action on the Case or upon the Bond, if a Case for assigning the Bond or supporting an Action can be established. The Act of Parliament is positive, that under particular Circumstances, the *Lord Chancellor* shall issue a Commission; but if he arrests it before it is opened, he really does not issue the Commission under the Act of Parliament.

(*a*) *Ante*, Part I, of these Cases, 49. There the *Adjudication* had taken place; which the *Lord Chancellor*, on inspecting the Proceedings, thought the Evidence did not support.

(*b*) 7 *Ves.* 405. *Ante*, Part II. of these Cases, p. 151, n.

COLLINSON

COLLINSON and ANOTHER, Assignees of NEWMAN, a Bankrupt, *v.* HILLEAR.

1811, *Tuesday, July* 9.

3 *Campbell's* Cases at Nisi Prius, 30, 31.

To render the Proceedings under a Commission of Bankrupt Evidence pursuant to Sir *Samuel Romilly's* Act, it is enough to shew, that they are produced from the Custody of the Solicitor to the Commission, or to prove the Hand-writing of one of the Commissioners before whom they were taken.

IN this Case no Notice had been given (*a*), that the Bankruptcy was disputed; the Plaintiffs' Counsel, therefore, put in the Proceedings under the Commission.

Park for the Defendant, insisted that before the Depositions could be read, they must be proved to have been subscribed by the Persons making them, by some Person who was present when they were taken before the Commissioners.

Lord ELLENBOROUGH.

I shall hold it sufficient to shew that the Proceedings come out of the proper Custody, viz. that of the Solicitor to the Commission.

In this Case however, the Solicitor had been changed, and it could not be proved that the Proceedings had been handed over by him to the Person now producing them.

Lord ELLENBOROUGH.

Some further Evidence must be given, that these Depositions were taken under the Commission; but I shall consider it enough to prove the Signature of one of the Commissioners. This was done, and the Cause proceeded.

(*a*) 49 *Geo.* III. c. 121. s. 10.

POYNTON

1811,
Friday,
July 26.

POYNTON *v.* FORSTER and Others.

3 *Campbell's* N. P. Cases, 58. 61.

Semble, that in an Action for maliciously suing out a Commission of Bankrupt, it is a fatal Variance to allege, that the Defendant sued the Commission out of the High Court of *Chancery*.

In such Action the Allegation that the Commission was duly superseded, can only be sustained by the Production of the Writ of Supersedeas, and not by the *Chancellor's* Order, directing it to issue.

CASE for maliciously suing out a Commission of Bankrupt. The Declaration stated, that the Defendants without any reasonable or probable Cause whatsoever, sued and prosecuted out of His Majesty's High Court of *Chancery* against the Plaintiff, a certain Commission under the Great Seal of *Great Britain*, founded on the several Statutes made and then in Force concerning Bankrupts, &c.

The Commission being put in, *Park* for the Defendant, objected that it was mis-described in the Declaration, as it did not issue out of the High Court of *Chancery*, but under the Great Seal, by virtue of certain Acts of Parliament.

The *Attorney-General* and *Holroyd contra*, pointed out that the Commission was issued upon a Petition addressed to "*John* Lord *Eldon*, Lord High Chancellor "of *Great Britain*," and was actually signed by him "*Eldon*, C." That it might without Impropriety be said to issue out of the Court of *Chancery*; and at any Rate, that this Description might be rejected as Surplusage.

Lord Ellenborough was inclined to think that the Declaration contained a fatal Mis-description of the Commission, but saved the Point at the Request of the Plaintiff's Counsel (*a*).

The Declaration further alledged, that the Commission was afterwards duly superseded. To support this Alle-

(*a*) *Chapman* v. *Pickersgill*, 2 *Wilson*, 145.

gation,

gation, an Order was put in signed by the *Lord Chancellor*, directing the Commission to be superseded; but

Lord ELLENBOROUGH was of Opinion that it was necessary to produce a Writ of Supersedeas under the Great Seal (*a*).—Plaintiff nonsuited.

1811.

POYNTON v. FORSTER and Others.

(*a*) An Allegation in an Indictment that the Commission issued under the Great Seal of *Great Britain*, and Evidence that it issued under the Great Seal of the United Kingdom, is no Variance. *Rex* v. *Buller*, 1 *Taunton*, 71.

REX *v.* PUNSHON.

3 *Campb.* N. P. Cases, 96, 97.

1811, *Tuesday*, *Nov.* 5.

THIS was an Indictment for Perjury, charged to have been committed by the Defendant in passing his last Examination before the Commissioners, under a Commission of Bankrupt issued against him. The Counsel for the Prosecution put in the Commission and Proceedings, and proved the Adjudication of the Bankruptcy. It was objected on the other Side, that they were bound to give strict Evidence of the Trading, Act of Bankruptcy, and Debt.

Semble, that on an Indictment against a Bankrupt for Perjury before the Commissioners, it is necessary to give strict Evidence of the Trading, petitioning Creditor's Debt, and Act of Bankruptcy.

Lord ELLENBOROUGH was of that Opinion. The Authority of the Commissioners takes its Root in the Bankruptcy. While the Commission subsists, its Validity may be assumed for civil Purposes; but in a criminal Case, unless the Party was a Bankrupt, all falls to the Ground. His Lordship offered to save the Point (*a*).

The Defendant was acquitted on the Merits.

(*a*) *Rex* v. *Buller*, 1 *Taunton*, 71.

PRICKETT

1811, *Dec.* 11.

PRICKETT and CARRUTHERS and Others, Assignees of HALLIDAY, v. DOWN and Others.

3 *Campbell*, N. P. Cases, 131, 132.

Where Two Partners have stopped Payment, and a Commission of Bankrupt is taken out against one of them, a Debtor of the Firm who knows of the Stoppage cannot refuse to pay Money due to the the Firm on the Ground, that the other may have committed an Act of Bankruptcy, and that his Assignees might call upon the Debtor to pay a Moiety of the Money a second Time.

PRICKETT and *Halliday* were Partners; in *November* 1810 they stopped Payment; on the 16th *July* 1811, a Commission issued against *Halliday*. This was an Action against the Defendants to recover a Sum of Money due to the Firm; the Defendants objected, that as they had Notice of *Prickett*'s Insolvency (*a*), if a Commission of Bankrupt should afterwards issue against him, upon an Act of Bankruptcy prior to the Payment, they might be called upon to repay a Moiety of the Money to his Assignees.

Lord Ellenborough.

Till a Party has actually become a Bankrupt, and a Commission has been taken out against him, he may sue his Debtors. There may be Peril in paying a Man who is known to have stopped Payment; but that affords no Defence to an Action for a Debt justly due to him (*b*).

(*a*) 46 *Geo.* III. c. 135. s. 1.

(*b*) Payments enforced by coercion of Law are good against Assignees. *Foster* v. *Allanson*, 2 T. R. 479.

COLES

COLES and ANOTHER, Assignees of WRIGHT, *v.* ROBINS and OTHERS.

1812, *Monday, Feb.* 17.

3 *Campb.* N. P. Cases, 183. 186.

TROVER.—The Bankrupt was a Silversmith, and in the End of *October* 1810, sent the Goods mentioned in the Declaration, to be sold by the Defendants who were Auctioneers. Part were sold in *October* and Part in *November*. On the 1st of *November*, *Wright* surrendered himself to Prison in discharge of his Bail, and having lain there Two Months, a Commission was sued out against him on the 1st *January* following; on the 26th of *November*, the Defendants paid the Proceeds of the Sale to his Agent for his Use. There was no Evidence that they knew that he was in Prison, or that he was not carrying on his Business as usual.

A Trader sends Goods to an Auctioneer to be sold, and then goes to Prison, where he lies above Two Months. The Auctioneer not knowing of the Trader's being in Prison, sells the Goods, and pays him the Proceeds.

It was contended for the Plaintiffs, that as the Act of Bankruptcy referred back to the Surrender to Prison, the Goods were vested in the Assignees from that Time. It was insisted for the Defendants that this was a *bonâ fide* Payment of a Debt before Knowledge of the Bankruptcy, within 1 *Jac.* I. c. 15. s. 14 (*a*).

At the End of the Two Months a Commission is sued out against the Trader. Held, that the Assignees could not maintain Trover for the Goods against the Auctioneer, and that the Payment of the Money to the Trader under these Circumstances was protected by 1 *Jac.* I. c. 15.

Lord ELLENBOROUGH.

The Goods were put into the Hands of the Defendants before the Bankrupt went to Prison, and were sold before he had lain there Two Months, or a Commission was sued out against him. If they had known the Fact out of

(*a*) *Wilkins* v. *Casey*, 7 T. R. 241. *Foster* v. *Allanson*, R. 711. *King* v. *Leith*, 2 T. 2 T. R. 479.

which

1812.

COLES and Another, Assignees of WRIGHT, v. ROBINS and Others.

which the Bankruptcy sprung, that would have deprived them of the Benefit of the Statute; it was incumbent on the Plaintiffs to have proved Notice, as in *The King* v. *Leith*; and in the Absence of such Proof, the present appears to be exactly that Sort of Payment which the Statute was intended to protect.

Sittings after Easter Term, 52 Geo. III. *at* GUILDHALL.

HUMPHRIES and ANOTHER, Assignees of STONE, v. COGGAN (*a*).

The Commission and Proceedings under the Bankruptcy, are *conclusive* Evidence of the Trading, the Debt, and the Act of Bankruptcy, unless Notice has been given, in pursuance of the Statute 49 *Geo.* III. c. 121. s. 11, of the Party's Intention to dispute them.

THIS was an Action of *Assumpsit*, brought to recover a Sum of Money which the Defendant had received under an Execution executed after an Act of Bankruptcy.

Plea of the General Issue.

The Plaintiff had intended to have contested the Validity of the Commission, by impeaching the petitioning Creditor's Debt; he had however omitted to give Notice to that Effect, pursuant to the Stat. 49 *Geo.* III. c. 121. s. 11. The Cause now came on to be tried on the General Issue only.

The Plaintiffs put in the Commission and Proceedings, as conclusive Evidence of their Title.

The Defendants' Counsel then proposed to call a Witness who could disprove the Debt of the petitioning Creditor, as it stood on the Proceedings. This was opposed by the Plaintiffs' Counsel on the Ground, that the Sta-

(*a*) From a Note of Mr. *'Espinasse.*

tute

tute had made the Proceedings *conclusive* Evidence, which the Defendants could not dispute, unless they had given Notice of their Intention so to do. On the other Side it was contended, that all that the Statute had enacted, was, that the Commission and Proceedings should be Evidence; not *conclusive* Evidence. The fair Construction of it was, to make that Evidence which was not so before. Previously to the Act, *vivâ voce* Evidence was necessary to establish this Fact. Though the Party supporting the Commission, is placed in a better Situation, the Party opposing it is not placed in a worse. The Plaintiffs are sufficiently benefited, by having their Proof of Debt established by the Production of the Proceedings, instead of by oral Testimony; but as the Defendant could, before the Act, impeach the *vivâ* Proof, so he ought to be admitted to impeach the Proof on the Proceedings, which is merely a convenient Substitution for it.

MANSFIELD, C. J.

Said, he considered the Statute to be imperative on him; and, as making the Proceedings conclusive Evidence of the trading petitioning Creditor's Debt and Act of Bankruptcy, unless Notice of the opposite Party's Intention to impeach any of those Matters by Evidence at the Trial, had been regularly given; he accordingly refused to admit the Evidence.

Lens, Serjeant, and *Comyn*, for the Plaintiff.

Best, Serjeant, and *'Espinasse*, for the Defendant.

LINCOLN'S INN HALL. 1812, *March* 4.

Ex parte HOPKINS.—In the Matter of HAWES.

The Rule, that a Commission shall not be superseded, under which the Bankrupt has not surrendered, dispensed with upon the Application of all the Creditors who had proved: the Bankrupt being out of the Country, and not, according to the Belief of the Petitioner, having heard of the Commission.

THIS was an Application by the petitioning Creditor to supersede a Commission, under which *Hawes* had been found a Bankrupt, but had not surrendered; he was out of the Country, and the Petitioner by Affidavit stated his Belief, that he had not heard of the issuing of the Commission. All the Creditors who had proved, had subscribed their Names to the Petition as a Certificate of their Consent (*a*).

Mr. *Dowdeswell*, in support of the Petition.

Mr. *Cooke*, for the sole Assignee, consented.

The Lord CHANCELLOR made the Order.

(*a*) For the general Rule, that a Commission cannot be superseded previously to the Bankrupt's Surrender, *vide Ex parte Jones*, 8 *Ves.* 328. *Ex parte Stokes*, 7 *Ves.* 405. *Ex parte Jones*, 11 *Ves.* 409. *Ex parte Bean*, *ante*, p. 211. *Vide* an Exception to this Rule, *Ex parte Lavender*, in the First Part of these Cases, p. 55.

LINCOLN'S INN HALL. 1812, *March* 5.

Ex parte CHEESEWRIGHT.

Petition to have the Teste altered, and a Commission re-sealed,

IN this Case the Commission issued on the 1st of *February* 1812, but it had not been proceeded in; the petitioning Creditor being unable to prove an Act of

under which no Proceedings had taken place, in order to let in a subsequent Act of Bankruptcy, dismissed.

Bankruptcy

1813.

Ex parte CHEESEWRIGHT.

Bankruptcy prior to the Date of it: he now applied to have the Teste altered, and the Commission resealed, upon an Affidavit that he was able to prove an Act subsequent to the Time of its issuing; that previous to his striking the Docket, he had not entertained the least Doubt of being able to sustain the Commission by the necessary Evidence.

Mr. *Heald* in support of the Petition, admitted that he was not aware that in a Case like the present, such an Application had ever been granted: but that Objection might have prevented many Improvements in Bankruptcy; that there had been no Proceedings under the Commission: and he offered, if the Bankrupt thought fit to bring an Action for improperly suing out the Commission, to admit, for the Purposes of that Action, the Date as it originally stood.

The Lord CHANCELLOR.

Where there is previous to the Commission, a Trading, an Act of Bankruptcy, and a petitioning Creditor's Debt, and yet, on account of some clerical Error, it cannot be proceeded in, this may have been done (*a*). But I do not recollect any Instance where the Date has been altered, and the Commission resealed, merely to let in a subsequent Act of Bankruptcy; and I feel no Inclination to help those who take out a Commission upon such an Uncertainty. What Right have I to say the Bankrupt shall not bring an Action? and even if I were to grant this Application, upon the Condition that if the Bankrupt should bring an Action, you would not dispute the Date of the Commis-

(*a*) Till a Commission has been opened, it is considered as an Escrow, and a clerical Error may be corrected; if it has been opened, the Rule is inflexible, that it cannot, *vide Ex parte Thompson*, 9 *Ves.* 207. *Fisher's* Case, 10 *Ves.* 190. *Burrow's* Case, *ibid.* 286.

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sion, I am not certain that I should not prejudice that Action very much. Reflecting on the highly penal Consequences of a Commission of Bankrupt, I do not consider this to be a Case for any Indulgence.

Petition dismissed.

LINCOLN'S INN HALL.
1812,
March 6.

In the Matter of ———

Bankrupt arrested in returning from Commissioners, to whom he had surrendered at a private Meeting, cannot be discharged on Motion. *Secus* if he had taken under any Circumstances amounting to a Contempt of Court. But Leave was given to apply by Petition immediately.

MR. *Montagu* moved, that a Bankrupt might be discharged out of Custody, who had been arrested on his Return from the Commissioners, to whom he had applied to take his Surrender at a private Meeting. The Officer was present, and desirous of acting under the Sanction of the Court.

The Lord CHANCELLOR

Thought he could not grant the Application on Motion; that it would be different if the Arrest had been made under Circumstances, amounting to a Contempt of Court (*a*): but he gave Leave to the Bankrupt to apply by Petition immediately.

(*a*) A Solicitor arrested on his Way to *Lincoln's Inn* Hall, for the Purpose of attending a Petition in Bankruptcy, ordered to be discharged on Motion, having been first sworn by the *Register*, and examined by the *Lord Chancellor*: the Application was entitled in the Bankruptcy. *Castle's* Case, 16 *Ves.* 413. See also *Gascoyne's* Case, 14 *Ves.* 183. S. P. in which the *Lord Chancellor*, sitting in Bankruptcy, and the *Regist* being absent, administered the Oath, and examined the Par For Cases on Protection fr Arrest in Bankruptcy, *vide parte Ross*, *post*, 257.

LINCOLN'S INN HALL. *March* 1812.

In the Matter of BOLDERO.

MR. *Hart* requested that Agents in Town, might be permitted to sign a Petition in Bankruptcy, the Principals being resident at *York*: it was one of the Petitions in the Matter of *Boldero*, which it was of Importance should be heard on the next Petition Day; before which Time, the Signature of the Petitioners could not be obtained.

The Lord CHANCELLOR.

Be it so; the Agents undertaking to be answerable for the Costs (*a*).

(*a*) *Vide* the General Order of 12th *August*, 1809, in the First Part of these Cases.

Ex

LINCOLN'S INN HALL. *March* 1812.

Ex parte PEASE and Others.—In the Matter of BOLDERO.

Where indorsed Bills of Exchange are deposited by a Customer with a Banker, the latter has the absolute Power of disposing of them: and in the Event of his Bankruptcy, though the Customer might recover such Bills as remained in Specie, subject to the Banker's Lien for the Balance of his Account, yet he cannot follow their Proceeds if they have been converted. Such absolute Property however may be qualified by Circumstances: as where the Banker is Agent for his Country Correspondent, to receive and pay Bills for him, with an Allowance for so doing; or where in an annual Account stated between them, the Banker has entered the Bills as the Property of the Correspondent: in the one Case considering him as a Factor, and the Bills as remitted for a particular Purpose, viz. to be received and carried to Account as Cash when due; and his Power over them limited to that Object: in the second Case raising an express Declaration of Trust. Nor will it extend the Power so restricted to Agency; nor defeat such Declaration of Trust; that the Banker entered in his Books the Bills as Cash, or that he so considered them; his own Books not being Evidence for him, though they might be against him.

THE Petitioners were Bankers at *Hull*. The Petition stated, that they for several Years past, had employed the Bankrupts as their "*Agents*" in *London*,

Short Bills upon a Bankruptcy are to be delivered up, subject to the Bankrupt's Lien, and indemnifying the Estate against the Engagements on Account of the Party claiming them; whether they are to be considered short or not, does not depend upon the particular Mode of entering them in the Banker's Books, but upon the Habits of dealing between the Parties, and all the Circumstances together. The Mode of entering them is only Evidence.

When a Stranger to the Commission seeks Relief under the *Chancellor's* Jurisdiction in Bankruptcy, he submits himself to it in all respects, and the *Chancellor* will enforce his Order against him. A Point arising out of a Question of Proofs is within the Jurisdiction.

The Statute 21 *Jac.* I. c. 19. s. 11, does not apply to Bills of Exchange, which are considered as being in a Banker's Hands as a Trust.

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don, drawing upon them as their Business in the Country required, and making them Remittances from Time to Time, to meet the Acceptances on such Drafts. That an Account of the Bankrupts' Cash Receipts and Payments, was made up by them Half-yearly, on the 24th of *June* and the 31st of *December* in each Year, and sent to the Petitioners; at which Time Interest was charged on either Side of the Account, on each Day's Balance of Cash. With such Cash Account, the Bankrupts also sent to the Petitioners, a separate Account of Bills remitted by the Petitioners to them, and not then become due; and in which separate Account, such undue Remittances or Bills were uniformly stated to be the Property of the Petitioners, the same being in fact held by the Bankrupts, to be received by them as they became due, on the Petitioners' Account; and as they were respectively received, the Cash acquired thereby was brought into the Cash Account; that, in such Half-yearly Accounts, an Allowance was charged by the Bankrupts, and made by the Petitioners for Agency in transacting their Business.

That the Petitioners had received from the Bankrupts the usual Cash Account, and also the Account of undue Bills made up to the 31st of *December* 1811; on the Evening of which Day, the Cash Balance on the Cash Account, was correctly stated to be £5163 : 12*s* : 5*d*. in Favour of the Petitioners. The Bill Account was entitled, "A List of undue Bills, the Property of *J. R. Pease* "and Co. Esqrs. in the Hands of *Boldero*'s and Co's. the "1st of *January* 1812," and which amounted to the Sum of £29,231 : 11*s* : 10*d*. (*a*). That the Bankrupts, having continued to pay during the whole of the 1st of *January* 1812, their Receipts and Payments on that Day on ac-

(*a*) Copies of both the Accounts were annexed to the

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count of the Petitioners, had left a Balance in respect of such Day's Receipts and Payments against the Petitioners of £563: 12*s*: 7*d*.; so that the aforesaid Cash Balance of £5463: 12*s*: 5*d*. was on the Morning of the 2d of *January* 1812, (the Time when the Bankrupts stopped Payment,) reduced to £4899: 19*s*: 10*d*. by the Deduction of the above Sum of £563: 12*s*: 7*d*. but none of the Bills specified in the Account of undue Bills having become due on the said 1st *January* 1812, their Amount remained unaltered.

That the Petitioners, in order to furnish a further Fund against their Drafts upon the Bankrupts, on the 30th and 31st of *December* 1811, and on the 1st and 2d of *January* 1812, made various Remittances to them, amounting in the whole to £8104: 2*s*. which were not received until after they had stopped Payment. That these Remittances or the Proceeds thereof, had or would come to the Hands of the Assignees of the Estate and Effects of the Bankrupts.

That the Petitioners had duly paid and discharged all the Acceptances of the Bankrupts upon the Petitioners' Drafts, as they had respectively been returned dishonored, in consequence of their Failure; and that they would continue so to do until the whole of such Acceptances should be taken up; that no Part whatsoever thereof had been or would be proved against the Estate of the Bankrupts, so that no Part of such undue Bills, or subsequent Remittances, could be required to pay those Acceptances. That Petitioners had called upon the Assignees to deliver them up, but they had alledged that they could not do so without the *Lord Chancellor*'s Order.

The Petition prayed, that the Assignees of the Estate and Effects of the Bankrupts, might be ordered to deliver

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liver up to the Petitioners all the said Bills to the Amount of £29,231 : 11s : 10d. and those subsequently remitted to the Amount of £8104 : 2s. or such of them as were then in their Custody or Power; and to pay to the Petitioners the Proceeds of such of the Bills as might have been paid to them the said Assignees; and also to deliver to the Petitioners the Remainder of the Bills and subsequent Remittances, or the Proceeds thereof, when the same should come to their Hands, or that the Petitioners might be declared to be entitled to the same against the said Assignees; and that they might be directed to withdraw any Claim in regard thereto, against the Person or Persons in whose Hand the same, or the Proceeds thereof, might then be or that, &c.

This Petition was supported by an Affidavit echoing the Allegations of it; it was opposed by the Affidavit of Mr. *Nichols* an Accountant, who had inspected the Books of the Bankrupts; and also by the Examination of the Bankrupts before the Commissioners. The material Part of Mr. *Nichols*'s Affidavit is given in the Judgment of the Court, p. 239. The Bankrupts' Examination stated, that there never was any Agreement that they were not to negotiate the Bills; that they did not consider the Bills remitted, to have been remitted for the express Purpose of meeting the Bills actually accepted; but for general Purposes, and on a general fluctuating Account.

Mr. *Hart* and Mr. *Winthrop*, in support of the Petition (*a*). The Bankers in *London* were the Agents of the Petitioners, merely to receive the Bills remitted to them

(*a*) The Cases cited in the Argument at the Bar, in the Judgment of the Court, and upon this Subject, are abstracted in a Note at the End of *Ex parte the Leeds Bank*, p. 255, *post*.

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when they became due. There are two Classes of Bills not distributable under a Commission; Short Bills, and Bills remitted for particular Purposes; and within one or other of these Descriptions the Bills in question must fall: Bills cannot be considered as Goods and Chattels within the 21 *Jac.* I. c. 19. s. 11.

Sir *Samuel Romilly* and Mr. *Montagu* for the Assignees.

(Sir *Samuel Romilly* objected that the *Lord Chancellor* in Bankruptcy had not Jurisdiction to make the Order; the Petitioners being Parties claiming not under, but adversely to the Commission. Mr. *Montagu* contended on the Authority of *Ex parte Rowton* (*a*), that the *Chancellor* had the Jurisdiction;) this is not the Case of *Giles* and *Perkins*, a Question between a Banker and his Customer; but between a Country Banker and a *London* Banker, employed as a general Agent; not whether the Bills are strictly speaking Short Bills, but whether they were remitted on a general or a particular Account. If upon a general Account, to be blended with and considered as Cash, they cannot be claimed; that they were remitted on a general Account appears, from the Examination of the Bankrupts, and the Mode of keeping their Books, as spoken to by the Accountant.

The Lord CHANCELLOR.

The Assignees are perfectly commendable, in insisting that the legal Right of both Classes of Creditors shall be ascertained, and their Claims sifted to the Bottom. The

(*a*) *Ante*, p. 15.

Objection

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Objection to the Jurisdiction has been fairly stated. In the Case which has been cited (*a*), upon Reflection I was persuaded that I had the Jurisdiction. I know a great Deal of Time is consumed in hearing Arguments, but a great Deal of Justice is the Result. Upon the Facts of this Case, I shall say no more at present, than that with respect to the general Doctrine, I am not inclined to intrench upon it.

The Lord CHANCELLOR

April 14.

Fully stated the Petition, and gave his Judgment as follows:

The Objections made to the Petition are Three.

1st. It is insisted that the Demand of the Petitioners cannot be enforced at Law or in Equity, because on general Principles, Relief is not due to them.

2d. That if on general Principles Relief be due, yet these Bills, and the Proceeds of such of them as have been parted with, were in the Order and Disposition of the Bankrupts, with the Consent of the Owners; and therefore the Demand cannot be enforced against their Assignees.

3d. That if at Law or in Equity this Demand could be enforced against the Assignees of the Bankrupts, yet that it cannot be enforced by the *Chancellor* in his Jurisdiction in Bankruptcy, who must therefore refer the Parties to a Court of Law or of Equity.

The Petitioners insist, that the Bills when undue, were the Property of the Remitters: if the just Conclusion be, that the undue Bills converted to the Use of the Bankrupts, had a resulting Trust to the Remitters; the Bills remitted, but not so converted before the Bankruptcy,

(*a*) *Ex parte Rowton, ante*, p. 15.

must

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must necessarily be subject to a similar Trust; and I am also justified in stating, that if on the Authorities, the Petitioners can support their Demands against the Bills remaining in Specie at the Time of the Bankruptcy, they are also entitled to the Proceeds of the Bills recovered or received by the Assignees. It ought to be generally known, that if Bills indorsed are remitted to Bankers, they may dispose of them effectually, though contrary to the Faith of the Understanding between the Parties, and the Remitters can only come in as general Creditors; this is settled Doctrine (*a*): but in this Case it is material that *Boldero* and Co. were in a Sense the Agents of the Petitioners, with an Allowance by way of Commission for the Business transacted by them; and considering it in this View as a Contract between Country Banker and Principal, and Town Banker and Agent, the Terms of it must be regulated not by the legal Power which they would have generally as Bankers, but by their stipulated Right.

If the Contract between the Parties were, that the undue Bills remitted, while undue, were the Property of the *Hull* Bank; they were either their legal or their equitable Property, and an Action or Suit would lie for their Recovery. Could a Court of Justice look at moral Justice and not at legal Justice, a Man's own Property should be restored to him. If the *Hull* Bank had taken a Part in misleading the World as to the Property of *Boldero* and Co., the moral Justice of the Case would be altered, but still the legal Justice must prevail.

The Affidavit of Mr. *Nichols* requires a very particul Attention, to see whether it really calls in question t Case made by the Petitioners. *Nichols* says, "I am sa

(*a*) *Collins* v. *Martin*, 1 *Bos.* & *Pull.* 648.

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"fied in many Instances the Bank in *London* was over-"drawn. There are many Expressions in the Letters ex-"pressing immediate Credit both given and asked for "upon Bills due and not due. There were at different "Times Drafts upon the Bankrupts, without Remittances "to answer them, and Remittances without Drafts, and "sometimes Drafts with Remittances; all the Remit-"tances, when received, were entered in a Book kept "for that Purpose, in a gross Amount, whether consist-"ing of Bank Notes, Bills, or Notes on Demand, or "Bills payable at a future Day."—But in all Cases the Correspondence of Bill to Bill is but *Evidence* of Remittances being made for *a particular Purpose:* if I am not immensely mistaken as to the Rule of Evidence; the Books of a Banker, not communicated to those dealing with him, are no Evidences *against* those dealing with him, though they may be Evidence for them.

It was not the Purpose of *Boldero's* House, to make in the Book which has been spoken of by Mr. *Nichols*, a debit and credit Account; if in the Account sent to the *Hull* Bank, they state the undue Bills as the Property of the *Hull* Bank, then as between *Boldero* and Co. and the *Hull* Bank, so the Case must stand. *Nichols's* Affidavit, as far as it relates to the Books, does not alter the Case made by the Petitioners. It is of no Importance whether a Bill is written short or not, by this I mean that writing a Bill short is merely *Evidence*. *Ex parte Dumas* (1 *Atk.* 232.) and the other Cases referred to (*a*), prove this, that a Letter accompanying a Remittance, is Evidence which cannot be got rid of by the unauthorized subsequent Act of the Banker, in writing them short. The Bankrupts having by their Affidavits pledged themselves, that all

(*a*) *Vide* the Note, p. 255, *post.*

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must necessarily [illegible] by them, as made on also justifi[illegible] we must look at the general Petitione[illegible] Notion of them, to come at remain[illegible] The Question is, what is the are [illegible] If the Contract is, you shall rec[illegible] against Cash, and consider the [illegible] they shall have become matured into [illegible] Property of the Remtters, the Right of [illegible] to the Bills is clear. Is it not satisfac[illegible] that the Contract was, to receive Drafts and [illegible] to debit and credit Cash received and paid, and [illegible] Bills until due, to be dealt with in a particu[illegible] if dishonoured, and if honoured to be put to the [illegible] Account? Does not the uniform Transmission of Accounts to the *Hull* Bank establish this? Whatever Argument may be raised upon all the other Circumstances, we shall come to a safe Conclusion by attending to the Result of these Communications. In *December* 1811, *Boldero*'s House assert that they have so many Bills in their Hands, the Property of the *Hull* Bank. Here seems to be a clear Declaration of Trust; this might almost be said to be a Case of an express Declaration of Trust; but if not, we must consider the Application of the Cases. It is clearly settled, that where Bills are remitted on a general Account, and there is no Evidence to the contrary, they cannot be followed in case of Bankruptcy: if remitted for a particular Purpose, they may. The Difficulties in the Case of Bills of Exchange, arise from the Nature of the Property. Bankers may negociate and pledge Bills remitted and indorsed to them: if not negociated or pledged, they may be followed, and even their Proceeds recovered. *Giles* v. *Perkins* (*a*), goes a great Way. In *Bolton* v. *Puller*, C. J. *Eyre* lays down

(*a*) *Vide* the Note, p. 257, *post*.

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the Rule, that Customers may have Bills back from a Banker when Bankrupt, subject to the Lien which the Banker may have for the Balance of his Account. *Crook* v. *Hollingsworth*, is an extremely strong Case as to the general Doctrine. In that Case (*a*) Mr. Justice *Buller* differed from the Three other Judges of the *King's Bench*, and held, that to constitute a particular Account, there must be one entire Transaction. He there repeated a Sentiment which he was fond of expressing, that there ought to be no Difference between Courts of Law and Equity on Subjects of this Kind. He was a Judge of great Powers of Mind, but if there was any Thing in which he was most obviously mistaken, it was the Difficulty he had to see the Distinction between the Doctrines of the Courts of Law and Equity.

Perhaps one of the strongest Grounds on which Mr. Justice *Buller* rested his Opinion, was that you must take the Matter as it stood at the Time of the Bankruptcy; and if an Action could not take Effect at the Time of the Bankruptcy, a subsequent Event could not alter the Case; the other Judges differed from him, and admitted a Species of Relation. In the *Exchequer* Chamber, all the Judges agreed, and Mr. Justice *Buller* seemed afterwards, in *Bent* and *Puller*, to give way a little from his former Opinion.

This I am going to mention is a remarkable Case, *Ex parte Madison*, determined in Bankruptcy, 12th *November* 1796 (*b*). The Petition stated, that *Christopher* and *Thomas Shaw* established a Bank at *Southampton*, and

(*a*) *Maundrell* v. *Maundrell*, 10 *Ves.* 265.

(*b*) The *Lord Chancellor* read this Case from a MS. Note.

a Correspondence

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a Correspondence with *Staples* and Co. in *London*; there was a special Agreement that Short Bills remitted to *Staples* and Co. should not be discounted, unless *Staples* and Co. were overdrawn; *then* they might discount. *Staples* and Co. however did not discount when overdrawn, but charged Interest instead, for the Sums overdrawn. The Petition prayed the Delivery of the Short Bills to the Petitioners. The Court ordered the Assignees of *Staples* and Company to pay to the Petitioners as Assignees of *Shaw* and Co. the Bills, to the Amount of £2000, and also the Sum of £200, admitted by their Counsel to have been received. This Case is an Authority for the Prayer of the present Petition. I am clearly of Opinion, that these Bills in the *Hull* Case might be recovered by Bill in Equity, unless the Statute of *James* interferes. The Statute of *James* does not apply to Bills. Bills have always been considered as in the Hands of a Banker upon a Trust, with the Distinction however, that a Factor cannot pledge; but if the Bills have been dealt with by the Banker previous to his Bankruptcy, the Dealing is effectual, if dealt with afterwards you may follow the Money as Money. The Distinction is established as to Bills so remitted.

Then comes the Question, whether this Court in Bankruptcy has the Jurisdiction. It is true, an Assignee cannot come here and call on a Person to appear here, who claims nothing under the Bankruptcy. It is enough for me that it has been so considered. I know no Instance where Assignees have brought a Person here claiming nothing under the Commission, who they alledge has Money belonging to the Bankrupt in his Hands. The *Chancellor* says, bring your Action or file your Bill. If in this Case, the *Hull* Bank had said, there is a Cash Account on which £5000 is due to us beyond question, and there are also £10,000 Short Bills, and had petitioned

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Hull Bank; and the Decision must depend upon the Question, how far that Variation will affect them. The Variation I allude to, is the Want of an express written Declaration, that the Bills were not to be considered as the Property of *Boldero* and Co.; and the Question therefore is, whether there is necessary Implication to furnish the same Ground of Decision. 2dly. The Circumstance in these Three last Cases of Discount, which, although it has taken place to a greater or a less Extent in the Three Cases, has been to some Extent in all with the Exception of the *Hull* Case. It therefore becomes necessary to state with Precision the particular Circumstances. The Petition states, "that it was agreed "between the Petitioners and the House of *Boldero* and "Co., that they should accept and pay Bills for them in "*London*, and act generally as their *Agents*; in Con- "sideration whereof, the Petitioners agreed to deposit "with *Boldero* and Co., and always to keep in their "Hands the Sum of £6000 without claiming Interest for "it, or to allow Interest for any Diminution; and that "was to be considered as a Compensation for their Trou- "ble. The Petitioners afterwards agreed to add the "further Sum of £200 *per Annum*, which was finally "increased to £400, making, with the Interest of the "£6000, the annual Sum of £700, and which it was "agreed should be paid in lieu of the Commission and "other Emoluments, usually derived from Agency."— Now in all these Cases it is a material Feature, that the Bankrupts were not only the Bankers of the Petitioners, but also their Agents for valuable Consideration as such.— The Petition then states, "that the Petitioners from "Time to Time as Occasion required, drew Bills on the "Bankrupts to be accepted by them; to answer which "they remitted Bills chiefly drawn on other Persons, and "some drawn by other Persons on them, which they were "to receive and place to the Account of the Petitioners

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" when due, and to hold in their Hands until they became " due, as the Property of the Petitioners, without any " Authority to get the same discounted, or otherwise dis- " pose thereof, or the Proceeds, to their own Use;"—from this Allegation, upon the Authority of *Collins* and *Martin*, I must take them to mean without any express Authority so to do; that Case having decided, that the indorsing of Bills over to another gives him such an Authority; and though there was a great Deal of Argument in *Collins* and *Martin*, on the Distinction between a special and a general Indorsement, yet it is for the Benefit of Country Bankers to know that the Law is so settled; that the Indorsee can discount them as against the Remitter; and can deal with them not only fraudently, but effectually also. The next material Allegation is, " that the " Bankrupts were in the Habit of sending to the Peti- " tioners, weekly Accounts of their Receipts and Pay- " ments on Account of the Petitioners, and also a half- " yearly Account, as a general, stated, and balanced " Account: but in neither of such Accounts did they ever " notice or credit them with Bills remitted, as long as " they remained undue; neither did they debit them with " or notice Bills accepted by them, on Account of the " Petitioners till they were paid; the undue Bills were " entered in one Book as they arrived, and Credit given " for them as Cash in another Book when the Proceeds " were received; that it appears from the State of the " Accounts when the House stopped (*a*), that the Cash " Balance due from the Petitioners to the Bankrupts " amounted to £6451: 16*s*: 2*d*. including one dishonoured " Bill due on that Day, which is entered as being then " received, and not charged on the contrary Side till the " following Day; but no Credit is given to Petitioners

(*a*) The House continued to pay during the 1st of *January* 1812, and stopped on the 2d.

" for

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"for the Deposit of £6000, nor for certain undue Bills "amounting to the Sum of £6976: 15*s.* which the Bank- "rupts had improperly negotiated, without the Know- "ledge of Petitioners; so that in Fact, instead of the "Cash Balance being against the Petitioners, it was in "their Favour, in the Sum of £6524: 18*s*: 10*d.* or there- "abouts." The Consequence of that is, that supposing these Bills to be effectually discounted against the Petitioners, they would have to state against the Cash Balance the Deposit of £6000, and the Proceeds of the Bills, and they would be general Creditors for the Surplus: they are therefore in the Situation of Creditors, entitled in the Alternative, either to have these undue Bills delivered back, or to prove for the Proceeds of them, and therefore the Court is to decide, collaterally to the Question of Proof, whether they are to have the Short Bills re-delivered or not.—The next Statement is, "that on "the 2d of *January* 1812, there arrived at the Bankers "in *London*, a Remittance in Bank and Bankers' Notes, "to the Amount of £942: 17*s*: 6*d.* and which Remit- "tance was acknowledged by a Person of the Name of "*Neale*, one of *Boldero* and Company's Clerks, in a "Letter to the following effect: '*London* 2d *January* "1812; Messrs. *Townsend* and Co. Sirs, We have your "Favour of 31st *December* 1811, covering a Remittance, "Value £942: 17*s*: 6*d.* which we hold in reserve, and "at your Disposal:'"—this is a Document of some Importance, and an express Declaration, that the Bills so remitted were to be held at the Disposal of the Remitters, and in common Honesty they must be so considered: but it does not in any considerable Degree vary the Nature of the prior Transactions. On the 3d of *January*, and on the 4th of *January*, a further Remittance was received by the Bankrupts to the Amount of £3627, which the Petition alleges, was also acknowledged to be held to the Use of the Petitioners; and although it does not,

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not, as in the first Instance, state the Terms of the Acknowledgment, the Implication is, that they also were admitted to be held to the Use of the Petitioners. The next Question is, as to a Bill for £405, which is stated in the Petition as follows: "that the said Messrs. *Boldero* and Co. "deposited or pledged a short Bill for £405, the Pro- "perty of Petitioners, with a House of the Name of "*Austin, Maunde,* and *Austin,* on Account of some "Debt, which the said Messrs. *Austin, Maunde,* and "*Austin,* have since recovered, either wholly under an "Extent against the Bankrupts, or partly from their "Effects, and the Residue from some other Persons "being Debtors to them."—If *Austin* and Co. have any Demand against that Deposit, that Demand is effectual; if that Demand has been satisfied, the Bill must be returned to the *Wakefield* Bank, if they can make it out that they could have had it from *Boldero* and Co. according to the Fate of the other Bills in their Hands. The Petition next states, "that *Boldero* and Co. are under "Acceptances to a considerable Amount, for the Peti- "tioners; but none of such Acceptances have either been "paid by them or their Assignees, or proved under the "Commission; the Petitioners having taken up the greater "Part of them, and the Cash Balance is more than suf- "ficient to answer those that are outstanding."—It is here to be observed, that these Acceptances, although they have not been proved, yet they may be proved; and any Arrangement to be made must be made with Reference to that Consideration. The Petition concludes with the Prayer which I have already read.

The Case therefore presents this Question; whether the Short Bills remitted previously to the Stoppage are, under the Circumstances, the Property of *Boldero* and Co. or of the Persons remitting them? if of the latter, then they must be delivered up, or the Proceeds recovered from the Assignees,

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Assignees, subject however to the Lien which *Boldero* and Co.'s Estate has upon them; it being a general Principle that these Short Bills must indemnify that Estate against all Engagements, which *Boldero* and Co. have come under for the Petitioners. [It was here stated from the Bar, that the Petitioners had taken up all the Acceptances: the *Lord Chancellor* proceeded] That puts an End to a Question of much Nicety; and they are therefore now upon the Authority of decided Cases, in the same Situation as if *Boldero* and Co. at their Stoppage, had no Demand against them. Now the Evidence depends on several Affidavits: 1st. The Affidavit of Mr. *Towning*, which swears to the Agreement between his House and the Bankrupts to the Effect already detailed in the Petition; the Examination of the Bankrupts before the Commissioners, and the Affidavit of Mr. *Nichols*, as to the Circumstances of these Houses, and the Mode of keeping their Accounts. In the Examination of Mr. *Boldero*, there is no Passage directly applying to the *Wakefield* Bank; he states as follows: "the Course of "our Dealing with the *Wakefield* Bank was, that they "made Remittances, and we accepted and paid Bills in "the same Manner with the other Banks I have men-"tioned: so of the *Hull* Bank: the *Yeovil* Bank had "generally a Cash Balance in their Favour:"—he states that the Course of Dealing with the other Banks was "to consider the Bills at Items of a general Account, as "remitted on a general, open, fluctuating Account."—The Court is therefore bound to learn what is meant by a general, open, fluctuating Account; now, in the *Hull* Bank, it has been admitted, that in Spite of those Words, they never considered the Short Bills as their Property in the full Sense of that Word: and as the Dealing with this Bank was the same as with the *Hull* Bank, the Words "general, open, fluctuating Account" must be construed by the same Qualification.

Nichols

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Nichols the Accountant, says in his Affidavit, "that "the Bankrupts were generally under Acceptances to a "considerable Amount above all the Effects remitted by "the Petitioners, or received on their Account; the seve- "ral Remittances, when received, were entered in a Book, "kept for that Purpose, in a gross Amount, whether con- "sisting of Bank Notes, Bills, or Notes on Demand, or "payable at a future Day, and which Book was the Sub- "stitute for the Book called the Bills receivable of regular "Commercial Houses, and the said Bankrupts took the "Sheets or Parts of Letters on which Petitioners advised "of Bills drawn on the Bankrupts by the Petitioners or "their Customers, and that was the Substitute for the "Book called Bills payable. In another Book kept by "the Bankrupts, the gross Amount of each Day's Remit- "tance was carried to the Credit of the said Petitioners, "and they were debited with the total Amount of Drafts "advised to have been drawn upon the said Bankrupts by "the said Petitioners or their Customers, from an Exa- "mination of which said Book it appears that the Peti- "tioners drew for much larger Sums than they remitted, "and the Bankrupts were thereby under heavy Accept- "ances beyond the Amount of Effects received."—And I take the Fact to be so; "that in the Cash Ledger of "the said Bankrupts, all Bills remitted by the Petitioners, "and all Monies paid on their Account to the Bankrupts "were carried to the Credit of the Petitioners, on the "respective Days the same were respectively due, or the "Monies were severally received; and the Petitioners "were in like Manner debited with the Amount of the "several Sums paid by the Bankrupts on the Petitioners' "Account, and with the Amount of all Bills which were "returned dishonoured, together with the Amount of the "Expenses attending the Noting and Protesting, on the "respective Days when the same were severally paid and "dishonoured."

Now,

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Now, supposing the Petitioners to have had a clear Knowledge of this Mode, adopted by the Bankrupts in keeping their Accounts; the Question would not depend upon this Book or that Book, upon this Entry or that Entry; not merely upon the Fact whether or not they were first written short in one Column, and afterwards carried out into another; but whether upon the whole Result, Credit was or was not to be given till a future Time; how then does this appear upon the Accounts rendered to the Petitioners? The Accounts rendered weekly and half-yearly never mention these Bills till after they have been received; and I do not think that *Nichols*'s Affidavit affects the Case made upon the Petition. There is undoubtedly *primâ facie* Evidence, that a Credit was called for, and a Credit was obtained by Receipt of the Remittances; this is explained by subsequent Dealings; and if Credit was not given or taken till the Remittances became due, you must understand the Transaction by that. There is one Fact worthy of being mentioned; viz. that in some Cases express Permission was given to the Bankrupts to discount some of the Bills remitted, and to carry the Proceeds to the Cash Balance. And as to that, Mr. *Towning* states a very material Circumstance, for those who consider the Power which a Banker has of discounting Bills which are indorsed to him, viz. that it is a discreditable Thing for a Banker to carry into the Market Bills which are specially indorsed.

Towning, in his Affidavit says, to a Proposal made by him and his Partner, in a Letter of the 9th *May* 1804, to send good discountable Bills, not specially indorsed, to *Boldero* and Co. they replied in the following Words: "Upon any Excess in your Negotiations, it will afford no "Relief to us to have such Bills put into our Hands, but "*Thomas Richardson* has several Channels through which "he

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"he can procure Money for good Paper." That in consequence thereof, Deponent and his Partner did frequently, when the State of his Cash Account with the Bankrupts rendered it necessary, send Bills directly to *Richardson*, who got them discounted, and paid the Proceeds to the Bankrupts, to be placed as Cash to the Credit of Petitioners' Account; and I think this bears a great Deal on the Fact of permissive Discount, and the general Authority of the Bankrupts so to dispose of the Bills.

Here I must admit, I have exerted more mental Operation, if I may use the Expression, to come to my Conclusion in this Case, than in that of the *Hull* Bank, because in that Case there was a constant Declaration of Trust, that the Short Bills were the Property of the *Hull* Bank. If I could not therefore break down the Effect of that Declaration, it was a clear express Trust, and therefore had nothing to do with that which was so much argued at the Bar, a Remittance for general or particular Purposes. The Question here, in the Absence of such express Declaration, is, do the Circumstances, independent of what appears on permissive Discount, satisfactorily make out that the Short Bills are to be considered as the Property of the *London* Banker and Agent, paid for his Agency, and not of the Country Banker and Principal.—Now the Books of the Bankers in Town, unless you make out that the Country Bankers were acquainted with the Mode of keeping them, is only Evidence against themselves. Every Thing, antecedent to the Accounts sent to the Country Bank, is a mere Memorandum: and the final Account proves, that they did not consider the Bills as their own till they received them. This is evidenced by the Bankrupts in their Examination; and by another material Fact, which rebuts their having a general Power to discount; viz. that they have not in their Account, rendered

dered on the 31st of *December* 1811, the Confidence to mention, that they so dealt with the Bills (*a*). In regard to the permissive Discount, if the general Contract be, that you are not to discount, without my Permission, the general Contract applies, wherever I have not given that Permission. Antecedent Approbation can never sanction subsequent Negotiation.

I have, in the former Case, stated my Opinion, that the Statute of *James* does not apply. Upon the whole I have exerted every Diligence; I have looked into all the Authorities; and considering the Relation of Country Banker and Principal, and Town Banker and Agent, paid for his Agency, I am of Opinion, that the Contract is as demonstrably proved as if it were written; that it is affected by Discount only, as far as is sanctioned by actual Permission, and that the Petitioners are entitled to the Relief they have prayed.

(*a*) It did not notice the discounted Bills, or carry the Proceeds to the Credit of Petitioners as Cash.

Ex

Easter Term, 1812.

Ex parte THE LEEDS BANK (*a*).—In the Matter of BOLDERO.

The Lord CHANCELLOR.

Vide the marginal Abstract to the two antecedent Cases.

Permission to discount, for the Purpose of reducing the Cash Balance, when the Banker shall be in advance, is a Circumstance controlling his absolute Authority over the indorsed Bills of his Customer.

THE Case of the *Leeds* Bank is distinguishable from that of the other Banks in this Circumstance; the *Leeds* Bank did authorize the House of *Boldero* and Co. to discount undue Bills, to reduce the Cash Balance when they should be in advance. Unless distinguishable by this Circumstance, the Cases are the same: there is the same Distinction between the *legal* Power of the Parties over the Papers remitted, and the *contracted* Power.

The Permission to discount in this Case is limited by the Purpose for which it was given, (*i. e.*) to reduce the Cash Balance; can it make any Difference whether, as in the last Case, the Permission be special and limited to an express Sum; or to so much as will meet the Cash Advance, be it £7000, or £12,000; can the Sums, being ascertained or not, make any Difference, or extend the Right into an absolute Authority?

I think the *Leeds* Case is entitled to the Benefit of the Principles regulating my Decisions in the other Cases.

I desire it to be understood that I approve the Conduct of the Assignees in meeting this Application at Arm's Length, and that they were right in requiring the Sanction of the highest Authority in Bankruptcy.

I determine these Cases myself without sending them to Law, because I think the Decision right. Justice in these

(*a*) The *Leeds* Bank having also become Bankrupt, the Petition was presented by the Assignees.

Cases

Cases must be prompt; Promptness, in Cases of Paper Credit, is Life itself to commercial Men.

Cases referred to, ante, page 235, n.

Ex parte Dumas.

Dumas and Co., Merchants in *Paris*, drew Bills on their Correspondents *Julian* and Son, Merchants, in *London*, and remitted other Bills to answer them; desiring that for such Drafts and Remittances a new and distinct Account might be opened under the Letter G, (thereby distinguishing a House in which they were concerned at *Cadiz*); and which was accordingly done.—*Julian* and Son, becoming Bankrupts, the Drafts on them were returned to and taken up by *Dumas* and Co., who thereupon petitioned for the Return of such of the Bills which they remitted to answer them, as were in *Julian*'s Hands, at the Bankruptcy. Lord *Hardwicke* made the Order, considering them as having been remitted for *a particular Purpose*, and reasoning from the Analogy of Goods consigned to a Factor. 1 *Atk.* 232. 2 *Ves.* 586. 1 *Cooke*'s B. L. 380.

Ex parte Ourssell.

The same Point arose of Remittances for a particular or general Purpose.

Lord *Hardwicke*.

"This is a Matter of Fact, not of Law. I am satisfied on the Evidence, it amounts to an Appropriation, and is within the Rule and Reasoning of *Ex parte Dumas:*

Zinck *v.* Walker.
2 *Blacks.* 1154.

Zinck employed *Jenner* as his Banker in *London;* on the 8th of *November* 1776, *Jenner* sent him an Account current, which, including all *Jenner*'s Acceptances on *Zinck*'s Account, up to the 30th of *November*, amounted to 1022*l*: 5*s*: 11*d*. On the 15th of *November*, *Zinck* sent by the Post to *Jenner*, a Bill for 150*l*. which was received the 18th. On the 16th of *November*, he sent him another Bill for 300*l*. which was received on the 19th. Both these Bills became due on the 18th of *January* following, and were paid to the Defendants, *Jenner*'s Assignees. On the 16th of *November*, *Jenner* stopped Payment; and became bankrupt on the 18th, after the 150*l*. Bill had come to hand. Before the Receipt of that Bill, *Zinck* owed *Jenner* a Balance of 195*l*: 13*s*: 2*d*. the whole of the Acceptances of 1022*l*: 5*s*: 11*d*. were taken up by *Zinck*, who brought an Action against the Assignees for the Amount of the Two Bills, deducting the Balance, and obtained a Verdict, subject to the Opinion of the Court of *C. B.* on the above Case. The Court held that it was just the Case of Goods consigned to a Factor; that the Bills were remitted for a particular Purpose, to discharge the Balance, and to cover the Acceptances; beyond which *Jenner*, or his Assignees, could have no Lien on them: and confirmed the Verdict."

Tooke *v.* Hollingworth.
5 T. R. 219.

Tooke was a Merchant, at *Manchester; Daniel* was a Goldsmith, in *London*. *Two Years before D.*'s Bankruptcy they agreed that *D.* should buy of *T.* all the light Gold he should send, at the Rate of 20*s*: 11*d*. *per* Guinea, and should pay for them by his Acceptances at Two Months. It was also agreed that *D.* should, from Time to Time, accept other Bills for *T.*'s Convenience, to cover which *D.* was to remit Value, which, together with the light Gold, should be sufficient for that Purpose. Under this Agreement *D.*, at the Time of his Bankruptcy, had accepted Bills not then due, to the Amount of 873*l*: 7*s*: 6*d*. above the Gold and Value remitted. Exclusive of that Account, *D.* was indebted to *T.* in 551*l*: 7*s*: 7*d*. After *D.*'s Bankruptcy, *T.* in ignorance of it, and in order to enable him to pay

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pay the Bills, sent by the Mail Three Bills of Exchange, and a Quantity of light Gold, which were delivered to the Messenger under the Commission. Having taken up *D.*'s Acceptances, he brought an Action of Trover for the Bills and Gold against the Assignees, and upon a special Verdict, the Court *(dissentiente, Buller,* J.) (*a*) were of Opinion that the Dealings between the Parties were particular, not general, and that the Bills and Gold were sent for a special Purpose. *Buller,* J. thought, that to constitute a particular Account there must be one entire Transaction, as Goods ordered and Bills enclosed to pay for them; but that this was an Agreement, acted under for a general Dealing, to any Extent, and for any Time. It was carried into the *Exchequer* Chamber upon Writ of Error, and affirmed. 2 *H. Bl.* Rep. 501. *Eyre,* C. J. there considered it as under the second Part of the Agreement, a Case of Principal and Factor, or of Banker and Customer. The first Part of the Agreement having no other Operation than to fix the Value at which the light Gold should be carried to the Account as Cash.

BENT *v.* BULLER.
5 T. R. 494.

Bent kept an Account with *Caldwell* and Co., Bankers, at *Liverpool,* which consisted solely on one Side, of Bills which they gave *Bent,* on their Correspondents in *London,* and on the other, of Bills paid in by him, with Interest on either Side, as the Case might be, and their Commission. *C.* and Co. and their Correspondents becoming Bankrupts, *B.* was obliged to take up the Bills given him, and then brought an Action against *C.* and Co.'s Assignees, for those which he had paid in. The Court held he was not entitled to recover; and *Kenyon,* C. J. and *Buller,* J. said, that to constitute a specific Appropriation, there must be a Lodging of Bill for Bill, or a Transaction against a Transaction; here they were coming in Day after Day on a general Account.

BOLTON *v.* PULLER.
1 *Bos. & Pull.* 539.

Bolton was a Merchant, at *Liverpool. Forbes* and *Gregory* were Merchants in *London,* but also in Partnership with *Caldwell* and *Smith,* as Bankers, in *Liverpool,* under the Firm of *Caldwell* and Co. *Bolton* employed *Caldwell* and Co., as his Bankers, and they used to procure his Acceptances made payable in *London,* to be paid at *Forbes'* and *Gregory's.* These Payments were by *Forbes* and *Gregory* carried to the Account between them and *Caldwell* and Co., and by *Caldwell* and Co. to their Account with *Bolton,* in which he was made Debtor for all Cash received, and for all Bills so made payable, with a Commission of four *per Cent.,* and was credited for all Cash and Bills paid, and Interest on either Side, as the Case might be, upon a quarterly Balance. Bills having been, on the 28th of *February* 1793, accepted by *Bolton* to the Amount of 19,702*l.* payable at the House in *London,* to become due in *April,* he, on the 1st of *March,* and subsequent Days, in order to enable the House at *Liverpool* to provide for them, paid in certain other Bills, with his Indorsement on them. Some of these Bills, together with others, they remitted to *London,* to be carried to their Account, and some they negotiated and received the Value themselves. The House in *London* was, on the 28th *February,* and had been ever since, largely in advance to the House in *Liverpool.* They both became insolvent. *Bolton* took up his Acceptances, and brought an Action of Trover to recover the Bills in the Hands of the Assignees of the *London* House, and upon a special Verdict, the Court of *C. B.* were of Opinion, that the Remittance from the *Liverpool* to the *London* House was a Transaction with a third Party: that the *Indorsement* by *Bolton* gave the *Liverpool* House a Power of

(*a*) *Vide* the *Lord Chancellor*'s Observations in the *Hull* Case.

dealing

dealing absolutely with the Bills, although they had been paid in for a particular Purpose: (for which also see *Collins* v. *Martin*, 1 *Bos. & Pull.* 649.) and that they could not be recovered from the Assignees of the *London* House. *Note*, One of the Bills came to the Hands of the *London* House, on the Day they became Bankrupts; as to which, the Court said, that the Bill having been remitted, as far as concerned the Remitter, before the Bankruptcy, it could not be recalled.

Ex parte SAYERS.
5 *Ves.* 169.

Sayers, in *Dominica*, directed the Bankrupts, in *London*, to send him certain Quantities of Gold Coin, by every Opportunity, and remitted them Bills to the Amount of 16,000*l.* which they discounted. They being unable to procure the Gold in *London*, made a Remittance of 5600*l.* to their Correspondents at *Lisbon* for that Purpose, and wrote *Sayers*, they had done so. Their Correspondents could not procure the Coin; and returned good Bills, but not indorsed, to nearly the Amount of the 5600*l.* this Remittance got into the Hands of the Assignees, and upon a Petition for that Purpose, was directed to be delivered up to *Sayers*.

PARKE *v.* ELIASON.
1 *East.* 544.

Parke deposited in *Persent* and Co.'s Hands, Bills at Six Months and of longer Dates, for the Value of which, deducting Interest and Commission, he drew on them at Three Months. Before the Three Months elapsed, *Persent* and Co. became Bankrupts, having the long Bills in their Possession, and which their Assignees received. *Parke* tendered them the Bankrupts' Acceptances, and brought an Action for the Proceeds of his long Bills, and upon a Case the Court of *K. B.* were of Opinion that the long Bills were not deposited on a running Account; that it was the Case of a single Transaction for a special Purpose, and that *Parke* was entitled to recover.

GILES *v.* PERKINS.
9 *East*, 12.

It was decided that a Customer paying undue Bills into a Country Banker's, whose Custom was to give Credit for them as Cash, if approved, (deducting the Interest,) was entitled to recover upon the Bankruptcy of the Banker, and the Cash Balance being in his Favour, the Bills in the Hands of the Assignees, or the Proceeds of such as they had received. And *per* Lord *Ellenborough*, C. J. Every Man who pays undue Bills into his Banker's, places them there as in the Hands of his Agent, to be received when due. If the Banker discount the Bill or advance Money upon it, he then either acquires the entire Property in it, or has a Lien *pro tanto*; but he can have no Lien till his Account be over-drawn. *Vide Ex parte Sargeant, ante*, 153. *Ex parte Rowton, ante*, p. 15. The Principle that a Remittance for a special Purpose operates as a Lien, and will not constitute general Assets, extends to Receipts by the Administrator or Executor of the Party, who was so to have applied them. *Hasel* v. *Smithers*, 12 *Ves.* 119.

By the 52 *Geo.* III. c. 63. The Embezzlement or Misapplication by Bankers, &c. of any Securities or Effects deposited with them, is made a Misdemeanor, with Punishment of Transportation, not exceeding fourteen Years: and without Prejudice to any Remedy which the aggrieved Creditor may think proper to take, for the Recovery of his Property.

In

Easter Term, 25th *April*, 1812.

In the Matter of LAMBERT.

The General Order of the 29th of *Dec.* 1806, which directs that a Commission shall be sealed at the next public Seal, in case there shall be one within Seven Days, means that it shall be sealed at the next immediate Seal, without any Discretion on the Part of the Bankrupt Office to defer it till another Seal within the Seven Days.

THIS was a Question, upon the following Clause of the General Order of the 29th of *December* 1806: "It is further ordered, That in case any Person who shall "hereafter strike any Docket, shall not within Four Days "next after such Docket shall be struck, order a Com- "mission to be sealed at the then next public Seal, in "case there shall be a public Seal within Seven Days "next after such Docket shall be struck: or by a private "Seal, within Eight Days after the striking of such "Docket, and shall not cause the same to be sealed "accordingly: then that any Person may be at Liberty "to sue out a Commission, without any Notice being "given to the Person who shall first have applied for "such Commission."

The Docket was struck on the 16th; the Commission was applied for on the 20th; the next public Seal was on the 21st; but the Commission was not sealed till the 23d, which was also a public Seal. Application was made by another Creditor at the Bankrupt Office, for a Second Commission. The Office refused it, without the Sanction of the *Lord Chancellor*.

The Lord CHANCELLOR

Thought it right to declare, that the Order must be understood to mean the next immediate general Seal, without any Discretion on the Part of the Office to defer the sealing till a subsequent one. But as the Person first applying had thrown himself upon the Office, he would not in this Instance deprive him of his Commission.

Ex

Trinity Term, 9th *June*, 1812.

Ex parte PROSTON.

Advertisement in the *Gazette* suspended upon Affidavit of the Bankrupt's Solvency, and of his having committed no Act of Bankruptcy.

THIS was a Petition to supersede a Commission, which had issued against the Petitioner, under which he had been found a Bankrupt: and in the mean Time to have the Insertion of the Advertisement in the *Gazette* suspended. The Affidavit stated, that the Petitioner had more than sufficient to pay all his Debts, and that he had committed no Act of Bankruptcy.

Mr. *Leach* and Mr. *Montagu*, in support of the Petition, stated that the Object of it was to prevent incalculable Mischief being done to the Petitioner, by publicly declaring him a Bankrupt. The Question of Supersedeas could be disposed of at another Opportunity.—They cited *Ex parte Foster*, *ante*, p. 49.

The Lord CHANCELLOR.

Take the Order to suspend the Advertisement, and let the Petition be mentioned again To-morrow (*a*). I recollect that in the Case *Ex parte Foster*, I suspended the Advertisement, being satisfied on the Proceedings, there was no Act of Bankruptcy.

(*a*) It was mentioned again and superseded, the Creditors consenting. *Vide Ex parte Lanchester*, *ante*, page 220.

Trinity Term, 11th *June*, 1812.

A Bankrupt, whose last Examination had been adjourned *sine die*; at a Meeting under his Commission for a distinct Purpose, gives his voluntary Attendance before the Commissioners, in order to be examined, and is there arrested. Held to be entitled to his Discharge, on general Common Law Principles, and ordered so to be, with his reasonable and necessary Charges, to be paid by the Solicitor and the Officer.

Ex parte ROSS.—In the Matter of ROSS.

THIS was the Petition of the Bankrupt, praying that he might be discharged out of Custody, at the Costs of the Solicitor who had sued out the Writ on which he had been arrested.

The Commission issued in 1810; after several Examinations had taken place under it, the last Examination was adjourned *sine die*. On the 10th of *May* last, the Bankrupt made out his Account, and transmitted it to his Assignees. On *Saturday*, the 30th of *May*, at One o'Clock, he attended a Meeting of the Commissioners at *Guildhall*, in order, as he alleged, to pass his last Examination, but without having been summoned for that Purpose; during his Attendance there he was arrested at the Suit of ———, by an Officer employed by the Solicitor to the Commission, who was also the Attorney in the Action; and by his Direction, upon his Examination being concluded, conveyed to Prison.

It was represented on the other Side, and admitted, that he had not been summoned by the Commissioners, to pass his last Examination, or to attend them: that the Meeting being summoned for another Purpose, he had caused a Clause in the Advertisement to be inserted, that he would then pass his last Examination: that the Solicitor had

Where the Arrest is illegal, all the Detainers are rendered inoperative. Nor does it make any Difference, that the Writs upon which such Detainers have taken place, were lodged previous to the Arrest.

The Commissioners can give no Directions, which will protect an Officer from the legal Consequences of discharging his Prisoner.

offered

offered to take the Opinion of the Commissioners upon the Propriety of the Arrest, who declined to interfere: he had also offered to go before a Judge at Chambers, which the Bankrupt refused. He was likewise detained upon other Writs, which had been lodged in the Secondary's Office against him.

Mr. *Hart* and Mr. *Cullen*, in support of the Petition, said they did not mean to press for a Commitment against the Parties for a Contempt; but insisted, that this being an illegal Arrest of an uncertificated Bankrupt, of course without any Property, they were entitled to his Discharge, not only with the Costs of the Application, but with the Costs as a Compensation for his Detention (*a*).

Sir *Samuel Romilly* and Mr. *Wilson*, *contra*, objected that as he had not been summoned by the Commissioners, he could not be considered as coming to attend them, or as being there for the Purpose of passing his last Examination (*b*).

The Lord CHANCELLOR.

Have you given Notice to the Plaintiffs on the Detainers?

Mr. *Hart*. Does your Lordship think that Necessity applies to a Case, where the Solicitor to the Commission is the Person who sued out the Writ?

The Lord CHANCELLOR.

I take it to be quite clear, that when the original Writ

(*a*) *Arding* v. *Flower*, 8 T. R. 534.

(*b*) *Johnson*'s Case, 14 *Ves.* 36.

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falls to the Ground, all the subsequent Writs fall with it; but then these Plaintiffs have Interests to support, which entitle them to Notice.

It stood over in order to give them Notice.

12th *June.*

Mr. *Courtenay* this Day appeared for a Plaintiff, whose Writ had been lodged in the Office, previous to the Arrest having taken place; it was returnable on the 10th of *June.* He submitted, that his Client, if he lost his Detainer, was entitled to be reimbursed the Expense of suing out another Writ.

The Lord CHANCELLOR.

With respect to Mr. *Courtenay*'s Client, it has been repeatedly determined, that if the Arrest is bad, all the other Writs are rendered inoperative as Detainers(*a*); nor can there be any Difference, whether such Writs were lodged before or after the Arrest. It is the Arrest alone that gives Efficacy to the Detainers; and if it be illegal, it can give Effect to nothing. As to the Hardship of being put to the Expense of renewing the Writ, it has so often been met with Decision, that I shall leave it as it is.

It has frequently been determined, that a Bankrupt is entitled to his Discharge, not only by the Operation of the Statutes of Bankruptcy, but also on general Common Law Principles (*b*): and there have been in Courts of

(*a*) *Ex parte Hawkins,* 4 *Ves.* 691.

(*b*) Considering the Bankrupt in the Character of a Witness or Party, attending Commissioners employed under the Authority of an Act of Parliament, sitting in the Nature of a Court, in the Administration of Justice. *Per* Lord *Kenyon,* C. J. in *Arding* v. *Flower.*

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Law, as well as in this Court, many Orders made on those Principles. If there be any Doubt of the Principle of *Ex parte Johnson*, I will settle it in one Word. My Decision in *Ex parte Johnson* went upon this; that in Point of Fact *Johnson* never was out of Custody; and that if there be an Escape, the Debtor cannot be admitted to say, as against his Gaoler, that he has escaped. I afterwards spoke to the Judges on the Subject, and they thought I was right.

In this Case, although there is great Suspicion operating against *Ross*, yet he was actually before the Commissioners for the Purpose of Examination, and in which Examination they were then proceeding; and he was within the Protection of those general Principles to which I have alluded. I think I shall not disparage the Mind of a Sheriff's Officer, or even of an Attorney, in supposing that they may not know the full Extent of the Law of which those Cases have developed the Principles; and before I can treat their Conduct as a Contempt, with a View to Punishment, I must be satisfied that their Minds were so informed, as to mean a wilful Disobedience. I am not satisfied of that in this Case. In regard to the Officer, he is on these Occasions placed in a hard Situation; if he does not discharge his Prisoner, he is to be proceeded against for a Contempt; if he does, he risks being rendered responsible for all the Debts on the Writs. I ought therefore long to pause before I say he has been guilty of wilful Disobedience. As to the Attorney, it appears that he was also the Attorney under the Commission. As to this, I do not wish to say more, than that Gentlemen would do better if they did not place themselves in such contradictory Situations. If that Attorney had a fair Doubt of the Bankrupt's Privilege, it is one Thing to order him to restore the Bankrupt to his former Situation; and another to visit him with Punishment.

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The Commissioners acted right; they gave their Op to the Officer, but they could give no Direction, c ing him in Point of Law, from the Effects of that charge.

The real Question is, has there been a wilful Disc ence, or, on the other Hand, only a Doubt how t arising from a Want of legal Information? I will n harshly examine Affidavits fixing Criminality: bu must make no Difference to the Bankrupt; he mu placed in the same Situation as nearly as possible. therefore order that the Solicitor, and I must inclu Officer, (though I hope no Demand will be made him,) do pay to the Bankrupt the reasonable and sary Charges occasioned by this Arrest. I use the V reasonable and necessary Charges, because as this cation might have been made earlier, and as he mi he thought proper, have gone before a Judge, I think him entitled to any Charges occasioned by h availing himself of those Opportunities; and I ma Order for his Discharge on the Plaintiffs, as protec the Sheriff.

The Bankrupt is protected, *eundo redeundo & morando*, in all Cases where it is his Duty to attend the Commissioners; *Arding* v. *Flower*, 1 T. R. 534; his Protection extends to the End of the Forty-second Day. *Ex parte Donlevy*, 7 *Ves.* 317. And to the End of the enlarged Time allowed by the Commissioners, or the *Lord Chancellor*, in pursuance of the Statute 5 *Geo.* II. *Davis* v. *Trotter*, 8 T. R. 475. *Quære*, If having omitted render within the Time arrested on his Way to der, under an Order for so to do, the *Lord Chanc* discharge him. *Anon.* But a Bankrupt attend Hearing of a Petition, f to surrender after the T expired, is privileged fi rest, as a Party attend own Cause. *Ex parte* 15 *Ves.* 117. He is p

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against an Arrest upon an Attachment for Non-payment of Money, *Ex parte Parker*, 3 *Ves.* 554: and upon an Extent, *Ex parte Russel, post*; but he may be surrendered by his Bail, *Ex parte Gibbon*, 1 *Atk.* 238; and retaken upon an Escape, by his Gaoler, *Ex parte Johnson*, 14 *Ves.* 36. Whether or not the Privilege from Arrest in "coming to surrender," or *eundo & redeundo* in the other Cases has been forfeited, has been determined not upon a rigorous Construction of the Statute, or any precise Rule, but on the apparent Intention. *Kenyon* v. *Solomon*, 1 *Cowp.* 156. *Darby* v. *Baughan*, 5 T. R. 209. All Persons attending under the Commissioners' *Summons* are protected, and *semble* also a Creditor attending to prove. *Ex parte King*, 7 *Ves.* 316. *Kinder* v. *Williams*, 4 T. R. 378. In what Cases the Bankrupt is entitled to his Discharge on Motion, or must apply by Petition. *Vide ante, Anon.* page 230, *in Notis.*

Ex

Easter Term,
25th *April,*
1812.

Ex parte BASARRO.—In the Matter of HOLMES

Though joint Creditors have no Right to vote in the Choice of Assignees under a separate Commission, yet the Court will in some Cases appoint Persons in the Nature of Assignees, to take Care of the Interest of the joint Creditors, and to use the Name of the Assignees, indemnifying them. Where under a separate Commission, the separate Debts were very small, and the joint Creditors resided in *Sicily*, whither the Bankrupt had traded; the Court refused to allow the Certificate, till the joint Creditors had had an Opportunity of coming in under the Commission: and without the usual Undertaking to pay the separate Creditors, gave them in the mean Time, Liberty to make such Proof as they might be able, with the Offer of a new Choice of Assignees.

THE Prayer of this Petition was, that the Petitioner and the other joint Creditors of the Bankrupt, might be permitted to prove their Debts; that the Bankrupt's Certificate might be stayed; that a Person of the Name of *Waring*, and the other separate Creditors of the Bankrupt might be paid the full Amount of their Debts out of the joint Funds; that *Waring* might be removed from being Assignee; and a proper Person appointed to act in that Capacity with *Anderson*, the other Assignee.

Holmes carried on Business with *Holland*, in *Sicily*, under the Firm of *Holmes* and Co. In 1811, he came to *England;* and on the 24th of *October* following, a separate Commission issued against him, on the Petition of *Waring*, for a separate Debt of £126; there was but One other separate Debt against him to the Amount of £8, for Grocery. *Basarro* was a joint Creditor resident in *Sicily*, and made the present Application on behalf of himself and others in the same Situation. *Anderson*, the other Assignee, was the general Agent in *London* of those Creditors.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the Petition. Though generally speaking, joint Creditors are not permitted to prove under a separate Commission,

without

without undertaking to pay all the separate Creditors, yet here all the joint Creditors are in *Sicily;* they ought to have an Opportunity of coming in before the Allowance of the Certificate.

Mr. *Hart* and Mr. *Garratt*, for *Waring*, objected that his Lordship would not make any Order, affecting the joint Funds, without proper Evidence of the Debts in *Sicily*, and of what Securities the Creditors there might hold; that there was no Ground for the Removal of *Waring*.

The Bankrupt did not appear.

The Lord CHANCELLOR.

Joint Creditors have almost universally no Right to vote in the Choice of Assignees, under a separate Commission. Lord *Thurlow*, in some Cases, appointed Representatives of those interested in the joint Estate, though not actually as Assignees; and the Court will not hesitate to order Persons on behalf of the joint Creditors, to use the Names of the Assignees, indemnifying them. I shall give the joint Creditors Time to consider, whether they will have *Anderson* alone, or another Person appointed Assignee with him. I shall not allow the Certificate. Direct a Meeting of the Commissioners to be held, with Liberty for the joint Creditors to offer such Proof as they may be able, and let the Choice of Assignees stand over.

LINCOLN'S INN HALL. *Dec.* 1810.

Ex parte COOMBE.

A Transfer of Deeds, from a Depositary in whose Possession they constituted an equitable Mortgage, to the Person who discharged his Debt, not considered as an Assignment from him, so as to over-reach an Act of Bankruptcy, against the express Words of a Defeazance on a Warrant of Attorney, stating that the Deeds had been deposited by the Bankrupt himself.

THIS was a Petition for a Sale of certain Le Premises on the Ground of there being an e Mortgage; and to be admitted to prove for the I

A Publican of the Name of *Morgan* had d the Lease of the Premises in Question, with *Meux* and Co.; and had given them a Warrant o ney, on which they had entered up Judgment, an out Execution for the Sum of £1260. *Morgan* to Petitioners to pay off that Debt to *Meux* a which they agreed to do upon having the Securi Warrant of Attorney, and a Deposit of the Lea pursuance of this Agreement, on the 20th of J 1810, a Clerk of the Petitioner's went with *Mo Meux*'s Counting-house, and there paid what th advanced, with the Expenses of the Execution, & received the Lease (*a*). On the same 20th of *J Morgan* executed a Warrant of Attorney, with a zance reciting that the Petitioners had lent him and that he had deposited with them the Lease Premises, as a Security for the Payment of it.

The Commission issued against *Morgan*, in

(*a*) The Money was paid by *Coombe*'s Clerk to *Meux*, without passing through *Morgan*'s Hands. The Affidavits were contradictory, whether the Lease was delivered directly from *Meux* to the Petitioner's Clerk *Meux* to the Bankru by him to the Clerk. was not, however, Stress laid upon this Argument.

1810, on an Act of Bankruptcy, of the 10th of *January* preceding.

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Mr. *Cooke* in Support of the Petition, admitting that this, as an original Delivery to the Petitioners, by the Bankrupt, would be over-reached by the Act of Bankruptcy; contended that as the Assignment of *Meux* and Co., which in Effect and in Equity it was, it must be referred to the Time of the original Deposit.

Sir *Samuel Romilly* and Mr. *Roupell, contra,* insisted that it was a distinct Transaction between the Petitioners and *Morgan,* without any Contemplation of an Assignment; and that they were concluded by the express Words of the Defeazance in the Warrant of Attorney.

The Lord CHANCELLOR.

The Question in this Case is, whether I am to consider *Meux* and Co. as the Agents of the Bankrupt, and the Petitioners as dealing with them for an Assignment of their Security. The Justice of the Case is certainly in that View of it; but there is no Doctrine to be more carefully watched than that of Lien on Deposits. Mr. *Coombe* has unfortunately taken a Deposit from *Morgan,* instead of an Assignment from *Meux* and Co.; can you carry your Rights farther on a Deposit of Deeds than on an actual Mortgage? Suppose a Mortgage, and nobody a Party to it but the Bankrupt; could you have claimed to have been in a better Situation; and can you take this Deposit against the Recital in the Defeazance, otherwise than on a Mortgage?

Petition dismissed without Prejudice to a Bill.

THORPE

Trinity Term, 1812, 3d *June*.

THORPE *v.* GOODALL.

The Lord CHANCELLOR

There is no Equity to compel a Bankrupt to execute a general Power of Appointment, for the Benefit of his Creditors, in Favour of a Purchaser from them.

THIS Day stated the Facts of the above Case (*a*), and proceeded as follows:

The Question raised upon this Demurrer, is not as to the Effect of the Bankruptcy upon the Power, nor what would be the Case, as between the Creditors of the Bankrupt, and any Appointee claiming under him; nor whether from the general Nature of this Power, it is an Interest in the Bankrupt which is transferred to and vests in the Assignees, under the comprehensive Terms of the Statute. The Question is, whether this Court will, upon a Bill by the Assignees, compel him to execute it in Favour of a Purchaser from them. The Execution of the Power, in this Instance, would be in Effect to suffer a Recovery; but previously to the Statute, although many Cases must have occurred in which the Creditors would be desirous of attaining that Object, a Bankrupt could not have been compelled to suffer a Recovery.

I know of no Instance in which this had been done. I have been able to find nothing on the Subject, except in that Case in *Vesey* (*b*): and the Absence of all Authority, strengthened by the express Provisions for Interests of this Kind in the Insolvent Acts, is a very strong Confirmation of the general Reasoning in Favour of the Demurrer.

Demurrer allowed.

(*a*) *Vide* First Part of these Cases, 40. 17 *Ves.* 388. 460.

(*b*) "Tenant for Life, with "Power to charge with £100, "becoming Bankrupt: Lord "*King* held it was merely a "Power, not such an Interest "as would pass to the As- "signees."—Stated in the Argument in *Lord Townsend* v. *Windham*, 2 *Ves.* 3.

Ex

Ex parte BAGLEHOLE.

Trinity Term, 1812.

A COMMISSION of Bankrupt had issued against *Baglehole*, upon the Petition of *Smart* and *Bryant*, under which he had been found and declared a Bankrupt. He now applied to supersede it, upon the Ground that *Smart*, at the Time of his so becoming the petitioning Creditor, was resident and domiciled in *France*, trading there with the King's Enemies, and therefore upon the Principle of the decided Cases, not entitled to any judicial Process in this Country (*a*).

Against the Petition, it was insisted that Mr. *Smart* was in the Enemy's Country, under the King's Permission, given with the Advice of the Privy Council; which, although it did not directly authorize his Residence there, yet as it gave him License to export certain Goods and import others, must be considered as sanctioning the Means by which that License could be effectuated. That he was there for the fair Purposes of such Imports and Exports

Although an Order in Council, licensing a Party to export and import certain Goods to and from an Enemy's Country, does not authorize his Residence and Trading in the Enemy's Country; yet if he be there for the fair Purposes of his Licence, it is not a Ground for superseding a Commission founded on his Petition.

(*a*) If a *British* Subject voluntarily reside in an Enemy's Country and carry on Commerce there, he is disqualified as an Alien Enemy to sue in our Courts of Justice, although naturalized by a Neutral State, and recognized as a Citizen of that State, both by its diplomatic Agents and the Enemy's Government. *O'Mealy* v. *Wilson*, 1 *Camp.* N. P. Cases, 482. And *semble*, if a Neutral voluntarily reside and carry on Commerce in an Enemy's Country, he is an Alien Enemy to all Civil Purposes. *Ibid.* In *Macconnel* v. *Hector*, 3 *Bos. & Pull.* 113, it was decided, that a Commission founded on the Petition of a *British* Subject, resident in *England*, for a Debt due to himself and Partners, who were *British* Subjects resident and trading in an Enemy's Country, could not be supported.—As to Acts impliedly legalized by a Licence to trade, viz. Insurance of an Enemy's Ship. *Vide Kensington* v. *Inglish*, 8 *East.* T. R. 273.; and the Right of an Enemy to stop his Goods in *transitu* upon the Bankruptcy of his licensed Vendees. *Fenton* v. *Pearson*, 15 *East.* T. R. 419. The Principle of the Cases is stated in the Text.

ports

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ports only, and not for general Trade; and an Affidavit was filed to that Effect.

Sir *Samuel Romilly* and Mr. *Cullen*, in Support of the Petition.

Mr. *Leach*, Mr. *Montagu*, and Mr. *Rose*, *contra*.

The LORD CHANCELLOR.

Upon the Whole of these Affidavits, it is quite impossible to say that there has been more of a Trading with the Enemy, or of a Residence in the Country, than is justified by the fair Construction of the License. If under the Pretence of that License it has been otherwise, this Commission must be superseded—I cannot supersede it upon the Evidence before me; but I will not prevent the Petitioner from trying the Question in an Action at Law, if he thinks fit. None of the Licenses in Terms authorize a Residence in the Enemy's Country; but I should not therefore think myself bound to tell a Jury that a Residence for the Purposes of the License was unauthorized by it.

An Order was made that the petitioning Creditor should bring an Action against the Bankrupts, who were not to set up the Bankruptcy, but to plead *instanter*, and the Plaintiffs to be at Liberty to reply, so that the Cause might be heard at the ensuing Sittings.

LINCOLN'S INN HALL. *June* 27, 1812.

BRADLEY *v.* MILLAR and OTHERS, Assignees of BLOXAM and Co.

A. and *B.* Partners, gave a joint and several Bond to *C.*, who afterwards becomes indebted to *A.*: *B.* becomes Bankrupt; *C.* proves the Bond under the Commission; and then brings a joint Action against *A.* and *B.* to which *B.* pleads his Certificate. *A.* being by this Form of Action precluded from setting off his separate Debt applies for and obtains Injunction against *C.*'s proceeding in the joint Action.

SIR *Samuel Romilly* and Mr. *Wilson*, shewed Cause against dissolving the Injunction in this Cause. *Groves* and *Bradley*, when in Partnership, gave a joint and several Bond for £1000, to *Bloxam* and Co. their Bankers. After the Execution of this Bond, *Bradley* became a Creditor, on his separate Account, of *Bloxam* and Co. A separate Commission of Bankrupt was sued out against *Groves*, under which the Defendants proved the Whole of the Debt on the Bond, received a Dividend, and signed his Certificate. They then brought a joint Action on it against *Bradley* the solvent Partner, and *Groves* the Bankrupt, who pleaded his Certificate. *Bradley* being, by this Form of Action, precluded from setting off his separate Debt from *Bloxam*'s House, against their Demand on the Bond, filed his Bill for Liberty so to do, and for an Injunction.

Mr. *Hart* and Mr. *Cooke*, for the Defendants, insisted that they were not, by having gone in under *Groves*'s Commission, precluded from making him a nominal Defendant at Law, in order to effectuate their Remedy on the joint Bond.

The Lord CHANCELLOR.

Though the Holder of a joint and several Security, has it in his Option either to proceed jointly or severally, yet the Defendants have, in this Case, elected to proceed severally by proving the Bond under the Commission. They are therefore, not at Liberty to bring a joint Ac-

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tion upon it, but must proceed against the solvent Partner severally (*a*).

Injunction continued.

(*a*) *Vide Ex parte Hanson, Ante,* 158. 12 *Ves.* 346.

LINCOLN'S INN HALL. *July* 10, 1812.

Ex parte CURTIS.

A Petition to be admitted to prove a Debt, which the Commissioners had rejected, should state the Grounds of their Rejection.

It appearing in this Case that the Bankrupt was in Custody at the Suit of the Creditor, and that previously to the Proof the Commissioners insisted upon his Discharge. The Petition was dismissed with Costs.

THIS was a Petition for an Order to be admitted to prove a Debt, which the Commissioners had refused to receive, and that in the mean Time the Bankrupt's Certificate might be stayed. The Grounds of the Commissioners' Refusal were not stated.

Mr. *Trower*, in Support of the Petition.

The Lord CHANCELLOR.

How can I make an Order to admit a Proof upon a Petition, which does not disclose the Ground on which the Commissioners have rejected it? It may stand over till *Monday*, but I will not stay the Certificate.

Mr. *Hart, contra.* Upon an Affidavit filed by the Bankrupt, stated that the Bankrupt had been in Custody at the Suit of the Petitioner, and the Commissioners refused the Proof, unless he would consent to discharge him, which he declined (*a*). That upon the Bankrupt's obtaining an Order to advance the Petition, he had discharged him.

The Lord CHANCELLOR.

Dismiss the Petition, with Costs.

(*a*) 49 *Geo.* III. c. 121. s. 14.

Ex

LINCOLN'S INN HALL, 1812, *July*.

Ex parte SANDISON and ANOTHER.—In the Matter of TOWNSEND.

The Clerk of Enrolments is not entitled as against the Assignees to a Lien on the Proceedings for the Expenses of their Enrolment upon an Order obtained by the Bankrupt.

THE Bankrupt, upon a Petition for that Purpose had obtained an Order to have the Commission, and the Proceedings under it, entered of Record; the Assignees accordingly delivered them up to the Clerk of Enrolments in Bankruptcy (*a*). Upon their demanding them again, the Clerk of Enrolments claimed the Sum of £70: 14*s*. (*b*) for Fees, &c. which they refused to pay. The present Petition by the Assignees, stated their Inability to go on with the Commission, without having it and the Proceedings re-delivered to them, and prayed an Order on the Clerk of Enrolments to that Effect.

Mr. *Montagu*, in support of the Petition, stated that he was also authorized by the Clerk of Enrolments, to say, that he was desirous to act as his Lordship should direct.

The Lord CHANCELLOR.

I do not think he is entitled to any Lien; the Proceedings must be delivered up.

(*a*) *Vide* the 5 *Geo.* II. c. 30. s. 41. Mr. *Christian*'s Note, *Christ.* Bank. Law, 143; and *Davies*'s Bank. Law, 146, *et seq.* in which is given an Account of the Officers in the Bankrupt Office, and of the Nature and Manner of their Appointments.

(*b*) It was stated that a considerable Part of the Charge was for the necessary Stamps.

LINCOLN'S INN HALL, 1812, *July* 13.

Ex parte WARREN.

A Commission of Bankrupt against the Petitioner had been superseded at the Costs of the Creditor who sued it out. The Petitioner brought an Action on the Case, and took out a Summons before a Judge at Chambers, for Liberty to inspect the Commission, &c. The Judge thought he had no Authority to make the Order. The Petitioner then presented his Petition for the same Purpose, and obtained an Order, but under the Circumstances, with no Costs on either Side.

A COMMISSION issued against *Warren*, o 19th of *July* 1811, on the Petition of *P Purcell;* and on the 12th of *August* following, the *Chancellor*, upon a Petition presented by *Warren* f Purpose, ordered it to be superseded, and the C the Supersedeas, of the issuing of the Commission, that Application, to be paid by *Purcell.*

Warren then brought an Action against *Purc* maliciously suing out the Commission. The presen tion stating, that in order to prevent a Nonsuit, material that the Commission and Proceedings sh accurately set forth in the Declaration, and be pr in Evidence on the Trial; and that Application ha made to the Solicitor to the Commission, for L take a Copy, which had been refused; prayed an upon that Solicitor, to deliver up to the Secre Bankrupts, upon Oath, the Commission of Ba and all the Proceedings under the same, in his C &c.; and that they might be delivered by the Secr the Associate to the Judges, attending the Home to be by him produced on the Trial of the said with Liberty for the Petitioner, or his Solicitor, Copies, as they should be advised.

The Affidavit of the Solicitor to the Commissio that upon a Summons to shew Cause before a J Chambers, why *Warren*, or his Attorney, should at Liberty to inspect and take Copies of the Com and the Proceedings thereunder, for the issuing o the Action was brought; the Deponent attende

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Mr. Justice *Chambre*, who declined making any Order till he had looked into Authorities on the Subject. That upon the following Day, Deponent and Petitioner's Solicitor attended before Mr. Justice *Chambre*, for his Decision, who said that he could find no Precedent for such an Order; and none was made.

Mr. *Bell* in support of the Petition.

Mr. *Cullen contra.*

The Lord CHANCELLOR.

I think Mr. Justice *Chambre* quite right. This Court frequently orders Proceedings in Bankruptcy to be brought into the Secretary's Office, and there deposited; as, where it directs a criminal Prosecution for a Conspiracy, or where it assigns the Bond. But if the Court does not assign the Bond, as it sometimes does not when the Action on the Case will give more satisfactory Redress than the fixed Penalty on the Bond; it ought surely to give all the Assistance it can to the Support of the Action. The Solicitor to the Commission did right in taking the Opinion of the Court, as it was a delicate Point between him and his Client: but the Commission is the Commission of the Great Seal, and the Court will so deal with it as may best effectuate the Purposes of Justice. I shall therefore make the Order, but without Costs on either Side.

LINCOLN'S INN HALL, 1812, *July* 14.

Ex parte RUSSELL.

Bankrupt attending Commissioners in Obedience to their Summons, is arrested under an Extent at the Suit of the Crown. Held, that although the Crown is not within the Bankrupt Statutes, the Bankrupt is entitled to his Discharge, on the Principle of Common Law, protecting Witnesses attending for Examination under regular Process for that Purpose.—The Crown being the Creditor, the Order was made on the Gaoler.

THIS was an Application by the Bankrupt, to be discharged out of Custody upon an Arrest, under an Extent, executed upon him while in Attendance before the Commissioners for Examination, in Obedience to their Summons.

The Meeting took place at Two o'Clock, at an Inn in *Ipswich;* but a Creditor, whose Presence was necessary, not having then arrived, the Commissioners adjourned till Seven o'Clock in the Evening, at which Time he was expected. The Bankrupt retired into another Room in the same House, and was there arrested under an Extent issued for a Debt due from him to the Excise. On the Return of the Commissioners, the Bailiff offered to produce the Bankrupt for Examination, but refused to discharge him. The Commissioners declined to proceed in his Examination, unless he was discharged, and he was conveyed to Gaol.

Sir *Samuel Romilly*, in support of the Petition, admitted that the Bankrupt Statutes did not bind the Crown, but contended that *Russell* was entitled to his Discharge upon Principles of Common Law: that he was protected as a Witness attending for the Purpose of being examined under a regular Process for that Purpose: that, notwithstanding the Adjournment of the Commissioners, he was still in Attendance before them.

The Lord CHANCELLOR

Ordered the Solicitor to the Board of Excise, to be served

served with Notice to shew Cause, why the Bankrupt should not be discharged.

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Mr. *Cooke*, this Day, for the Commissioners of Excise, contended that the Bankrupt was entitled to his Protection, merely by virtue of the Statute 5 *Geo.* II. c. 30. s. 5, and not by the Common Law: that the Statute applies only to Creditors, and does not affect the Rights of the Crown. That although a Creditor having obtained an Extent in aid might be within it, yet the Crown, in this Case, was directly the Creditor. The Effect of an Order for his Discharge would be to defeat the Rights of the Crown; a fraudulent Bankrupt would, under his Commission, have Forty-two Days to withdraw his Person, and escape from an Extent, which is in Law as effectual against the Person, as it is against the Property (*a*).

The Lord CHANCELLOR.

Clearly the Crown is not bound by the Statutes in Bankruptcy. But I am justified, by several Decisions of the Courts of Law, in holding, that the Bankrupt is entitled to his Discharge, on the Spirit of the Common Law, affecting the Crown equally with any other Creditor. The Principle protects all Witnesses attending a Court competent to enforce their Attendance. In this Case, as the Crown is the Creditor, the Order of Discharge must be made on the Gaoler, who, it is not likely, will suffer from any Prosecution on the Part of the Commissioners of Excise, for his Obedience to it.

(*a*) *Vide Ex parte Ross*, and the Notes, *ante*, p. 260.

Ex

LINCOLN'S INN HALL, 1812, *August 4.*

Ex parte BUCHANAN.—In the Matter of KENSINGTON.

Order upon the provisional Assignee to deliver up short Bills in the Hands of Bankers at the Time of their Bankruptcy, the Estate being indemnified against their outstanding Acceptances on Account of the Petitioner.

THE Petitioners were Bankers in *Glasgow*, and prayed an Order for the Delivery of certain short Bills, which were in the Hands of *Kensington* and Co. their Correspondents in *London*, at the Time of their Bankruptcy. They undertook to leave with *Kensington's* Estate, Bills sufficient to meet the Acceptances, which it was liable for on the Petitioners' Account.

The Assignees had not been chosen; and the only Doubt suggested was, whether the Order should be made on the provisional Assignee? An Extent had issued on the Part of the Crown.

Sir *Samuel Romilly* and Mr. *Wilson*, for the Petition.

Mr. *Hart* and Mr. *Cooke*, for the provisional Assignee, who submitted to act as the Court should direct; and for the petitioning Creditor, who admitted the Facts.

Mr. *Leach*, for the Officers of the Crown, admitted their Extent to be satisfied, without touching the Property in question.

The Lord CHANCELLOR.

My Order will be a sufficient Protection to the provisional Assignee; but independently of the Bills being left with the Estate to cover the outstanding Acceptances, the Petitioners must give Security that their Bills will be paid when due (*a*).

(*a*) *Vide* the *Boldero* Cases, *ante*, Page 232.

Ex

LINCOLN'S INN HALL, 1812, *August* 4.

Ex parte VERE.—In the Matter of PALMER.

A. being in embarrassed Circumstances, a Deed of Composition is executed between him and his Creditors, by which they agree to take Ten Shillings in the Pound on their respective Debts, by Instalments, to be secured by his Promissory Notes. The Creditors covenant that they will, as soon as such Promissory Notes should be paid, release and discharge the said *A.*

THIS Petition set forth a Deed, bearing Date the 1st of *January* 1812, executed by *Palmer* and his Creditors, wherein, after reciting his Embarrassments, and an Agreement on their Parts to take Ten Shillings in the Pound on their respective Debts, it was witnessed that in pursuance of the said Agreement, and for and in Consideration of the Covenants therein contained on the Part of the said *Palmer*, they the said Creditors did for themselves, &c. covenant with the said *Palmer*, that they should and would take Ten Shillings in the Pound on the Amount of their respective Debts, by way of Composition and in full Satisfaction and Discharge thereof; the said Composition to be secured in the Manner therein mentioned: and that upon receiving the Promissory Notes of the said *Thomas Palmer*, for the first Instalment of Five Shillings in the Pound, and the second Instalment of Two Shillings and Sixpence in the Pound, and the Promissory Note of the said *Thomas Palmer*, indorsed by one *Thomas Morris*, for Two Shillings and Sixpence in the Pound, they the said several Creditors should and would when and as soon as such Promissory Notes should be paid and discharged, upon the Request, and at the Costs and Charges of the said *Thomas Palmer*, acquit, release, and discharge, &c. the said *Thomas Palmer*, his Heirs, &c. of and from all

Proviso, that in case of Default made in such Payment; or if any Commission of Bankrupt should issue, before the Whole of the Composition should be paid, then the Covenants, on the Part of the Creditors whose Debts should be so unsatisfied, should be null and void. The first Instalment is paid; the second is not; a Commission issues; the Creditors are entitled to retain the first Payment, and to prove under the Commission for the Residue of the original Debt.

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Ex parte VERE.— In the Matter of PALMER.

all and singular the Debts then due and owing from him to them respectively, and all Actions, &c. and that he might plead the said Indenture in Bar. Covenant by *Palmer* that he would pay the Notes. Proviso, that in case of Default made in Payment of the said Promissory Notes, so to be given to the Creditors for their Composition, or if any Commission of Bankrupt should be issued against *Palmer* before the Whole of the said Composition should be fully paid and satisfied; or in case Default should be made, in Performance of all or any of the Covenants to be observed and kept on the Part of *Palmer*; then and in either of the said Cases, the Covenants therein contained on the Part of the Creditors, whose Promissory Notes should be unpaid, or whose whole Composition should not have been satisfied at the Time of the issuing of any such Commission, or of such Default being made, to accept Ten Shillings in the Pound, should be null and void, and the several Creditors should and might from thenceforth claim and be entitled to have and be paid by the said *Thomas Palmer*, or to prove under any such Commission, the whole and full Amount of the Debts then due and owing, deducting thereout such Sums, if any, as they might respectively thenceforth receive on Account thereof; and that without Prejudice to their Claims on *Morris* for the last Instalment.

The Petition then stated, that the first Instalment had been paid, but that the Notes for the second had been dishonored. A Commission issued against *Palmer* on the 31st of *January* last, at the Instance of a Person who had become a Creditor since the Deed, and he had been found a Bankrupt. The present Petition was presented by the Creditors who had executed the Deed, and it prayed that they might be admitted to prove for the Residue of their Debts, retaining the Instalments which they had received.

Mr.

Mr. *Hart* and Mr. *Cooke*, in support of the Petition. There is a positive Provision in the Deed, that unless *Palmer* shall pay all the Instalments, the original Debt shall remain, subject to a Deduction of what may have been received. In order to bind Creditors by a Composition Deed, you must look to the precise Terms of the Deed itself: he does not assign his Effects; it is no Act of Bankruptcy; but a perfectly legal Covenant, of which the Covenantees are entitled to the full Benefit.

Sir *Samuel Romilly* and Mr. *Montagu contra.* These Composition Deeds ought to be construed strictly; they are private Bankruptcies, with all the Mischief and none of the Advantages of a Commission: the old Creditors are benefited, the new ones are defrauded; we say they are bound by their Agreement to take Ten Shillings in the Pound; or if they are entitled to any Indulgence, it should be only to prove their full Debt, upon refunding what they have received. The Deed contains a Proviso, that the Debt is to revive if the Debtor shall become a Bankrupt: it is therefore a Debt which arises either after or at the very Moment of the Bankruptcy, and ought not to be proved. It is contrary to Equity, that they should be paid out of Funds which have been supplied by Creditors subsequent to this Deed, and who derive no Advantage from it. *Ex parte Murphy* (*a*). *Ex parte Bennet* (*b*). *Ex parte Moore* (*c*).

The Lord CHANCELLOR.

These Petitioners at the Time of executing the Deed in question, stood in the Situation of Creditors competent to enforce their Demands, and therefore at liberty to enter into any Contract upon the Subject of them, which should

(*a*) 1 *Sch.* & *Lef.* Rep. 44.
(*b*) 2 *Atk.* 527. *Cooke's* B. L. 233.
(*c*) 2 *Bro.* Rep. 599.

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Ex parte VERE.— In the Matter of PALMER.

not be fraudulent against third Persons. They are willing to take Ten Shillings in the Pound. The first Thing to be inquired is, whether the Ten Shillings have been paid, or any Part has been paid, so as to operate as a Payment in Discharge of the Whole. They do not give their Debtor a Release upon having these Notes delivered to them; but "when and as soon as such Promissory Notes should be paid and discharged, they acquit and release the said *Thomas Palmer*." The Consequence is, that if in this Deed there had not been a Word about Bankruptcy, as the Creditors had never stipulated to give any Release, till the Payment of these Notes; until they had been paid, the Deed never could have been available as a Plea in Bar at Law. The Cases cited do not apply. I agree to them: but here the Object of the Deed has been defeated, without any Relation to the Bankruptcy whatever. The only Question is, whether they are entitled to prove what is due in Law, or to refund what they have received: and I am of Opinion they are entitled to prove what is due, because it is a Contract independent of Bankruptcy. If this has been a Payment according to the Deed, then according to the Deed they are entitled to retain it. If it has not been a Payment according to the Deed, then it has been in Part Payment of these Debts. I therefore think they are entitled to prove for the Remainder of their Debts. There have been several Cases upon Deeds, but I do not recollect having met with one like this (*a*).

(*a*) *Vide Ex parte Bennet*, 2 *Atk.* 527.

Ex

Ex parte THOMPSON.

1812.

It is not a good Objection to the Allowance of a Bankrupt's Certificate, that he is uncertificated under a former Commission. For though the Certificate under the second Commission would be inoperative at Law, yet a Court of Equity, if Circumstances required, would interpose by Injunction to give it Effect.

THIS was an Objection to the Allowance of a Bankrupt's Certificate, upon the Ground that he was uncertificated under a former Commission which had issued against him, and that his Estate would not pay Fifteen Shillings in the Pound (*a*).

Mr. *Leach* in support of the Petition.

Sir *Samuel Romilly contra*; the Objection might be an equitable Ground on which to supersede the first Commission, or to prevent the Protection of his subsequent Property, but it is none against the Certificate, as protective of his Person.

Mr. *Leach* in Reply; it would be idle to allow a Certificate which when obtained will be good for nothing. The Production of this first Commission at Law would preclude all Defence under the second Certificate.

The Lord CHANCELLOR.

True; but this Court would interfere to prevent the Production of the first Commission at Law, if the Circumstances required it. For though the second Commission is absolutely void at Law, it has, ever since the Time of Lord *Hardwicke*, been the Practice of the Court, where a joint Commission has been taken out, and then a separate one or *vice versâ*, and a Certificate has

(*a*) 5 *Geo.* II. c. 30. s. 9. *Vide* the Cases which have been decided on this Section, collected in *Christ.* Bank. Laws, p. 144.

been

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been obtained under the second, to sustain that Certificate (*a*). I apprehend these Objections cannot prevail against this Certificate.

(*a*) *Ex parte Crew, Ex parte Lees,* and *Ex parte Poulden,* 16 *Ves.* 236. 477.

LINCOLN'S INN HALL, 1812, *August.*

Ex parte WARNER.—In the Matter of COOKE.

Lien upon Copyhold Premises created by Deposit of the Copies of the Court Rolls.

THE Petitioners were Bankers, with whom the Bankrupt had deposited the Copies of the Court Rolls of certain Copyhold Premises, as a Security for Money, which they were to advance to him by occasional Discount. At the Time of the Bankruptcy they had advanced the Sum of £1719: 14*s*: 10*d*. They prayed a Sale of the Premises before the Commissioners; and a Direction that the Proceeds should be applied in Discharge of their Debt and the Costs of the Application.

Sir *Samuel Romilly* and Mr. *Newland,* in support of the Petition, cited the Ca es upon this Subject (*a*) of equitable Mortgage by mere Deposit of Title Deeds without writing, and submitted that there could be no Distinction between the Title Deeds of Copyhold Premises and those of other Estates.

(*a*) *Russell* v. *Russell,* 1 *Bro. Ch. Ca.* 269. *Ex parte Wetherell, Ex parte Haigh,* 11 *Ves.* 398. *Ex parte Comyn,* Vol. IX. 115. *Ex parte Combe, ante,* p. 268. *Ex parte Whitbread, post,* p. 299.

Mr.

Mr. *Leach* and Mr. *Cooke* for the Assignees. In the Case of Title Deeds, the Mischief of allowing an equitable Lien is not so great. Purchasers by demanding Title Deeds will have an Opportunity of knowing why they are out of the Possession of the Vendors. Copies of Court Rolls are not Title Deeds, but mere Abstracts, and may be had from the Steward of the Manor by applying for them; so that two or more People may claim an equitable Lien in respect of the same Estate. The Doctrine of equitable Lien is not upon the Principle, that the Deposit operates as Evidence of an Agreement, because that would be contrary to the Statute (*a*); but upon the Ground of a Part-performance, or that the Owner having parted with his Deeds has put it out of his Power to deal for the Estate with any other Person. This is a new Case; and the Court will not extend that Doctrine, of which it has so often expressed its Disapprobation (*b*).

The Lord CHANCELLOR.

I have no Hesitation in saying, I never should have made the Decisions, upon which the Doctrine of equitable Deposits is grounded: but I cannot distinguish this Case. Take the Order, subject to an Enquiry as to the Amount of the Debt.

(*a*) 29 *Car.* II. c. 3. s. 4. *Ves.* 404, *in notis.*
(*b*) *Ex parte Finden*, 11

In

LINCOLN'S INN HALL, 1812, *August.*

In the Matter of BRYANT.

A., as the petitioning Creditor for a Commission against *B.*, makes Affidavit of his Debt as for Goods sold and delivered, although at the Time, he had entered up Judgment in an Action for the Goods; upon an Application for a Supersedeas, it was contended that *A.* had not made Affidavit of the "*Truth and Reality of his Debt:*" the Objection was over-ruled.

THE Object of the present Application was to supersede a Commission upon an Objection to the petitioning Creditor's Debt; viz. that he took out the Commission upon an Affidavit of a Debt for Goods sold and delivered, whereas at the Time, he had entered up a Judgment in an Action brought for the Goods; that the simple Contract Debt was merged in the Judgment, and therefore the Affidavit upon which the Commission had proceeded was inaccurate.

Sir *Arthur Piggott*, Sir *Samuel Romilly*, Mr. *Hall*, Mr. *Wear*, and Mr. *Wetherell*, in support of the Objection. The Legislature, anxious that the greatest Caution should be exercised in the issuing of so severe a Process as a Commission of Bankrupt, has directed that the Creditor desirous of obtaining it, "shall swear to the Truth and Reality of such his Debt (*a*);" and upon a legal Debt alone can a Commission be supported; does the Truth and Reality of the Debt appear, when the Creditor swears to a Debt for Goods sold and delivered or Money advanced, and at the Time of such Affidavit, the only legal Debt which exists, is the Debt on the Judgment? the Statute requires as much Certainty as in an Action at Law; and supposing that a Plaintiff under the same Circumstances had declared in this Way, the Plea of Judgment recovered would have been fatal to him.

Mr. *Richards*, *contra*, contended that all the Statu-

(*a*) 5 *Geo.* II. c. 30. s. 23.

required

required was, that there should be a *bonâ fide* Creditor to the requisite Amount, without perplexing him with artificial Distinctions; that the Bond given to the Great Seal was conditioned to prove a Debt.

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The Lord CHANCELLOR.

I take the Meaning of the Act to be, that it is enough if the Creditor swears to the Truth and Reality of a Debt. After specifying the requisite Amount of Debt, the Section proceeds not in prohibitory but in directory Language, to enact, that there shall be an Affidavit of the Truth and Reality of the Debt; and that the Creditor or Creditors shall likewise give Bond to the *Lord Chancellor*, &c. conditioned for proving his, her, or their Debt, &c. and if such Debt shall not be really due and owing, that then the *Lord Chancellor*, &c. may upon the Petition of the Parties grieved, examine into the same, award Satisfaction for the Damages, or assign the Bond. There is not one Word making the Commission a Nullity; all that is contemplated is the Existence of a sufficient Debt. Here if the Judgment Debt be a good Debt, and the Objection vests only in a Form, another Commission might be taken out To-morrow. So if the Judgment were after the Bankruptcy, the Affidavit would be correct. I think the Objection cannot be sustained (*a*).

(*a*) *Ambrose* v. *Clendon*, 2 *Stra.* 1042. *Dawe* v. *Holdsworth*, *Peake's Ni. Pri.* Cases, 64.

Ex

LINCOLN'S INN HALL, 1812, *March* 26.

Ex parte THISTLEWOOD.—In the Matter of TEMPLE.

A. aged Thirty-two, and of infirm Health, gives £8000 for an Annuity of £800. He at Thirty-four becomes convalescent. Under the Bankruptcy of the Grantor, the Commissioners value the Annuity, upon the Principle that it having been worth £8000 at Thirty-two, it should be considered as worth rateably less at Thirty-four. The Grantee contends that it ought to be valued independently of that Circumstance, as an Annuity for the Life of a healthy Man of Thirty-four.

THISTLEWOOD, aged Thirty-two, and in an infirm State of Health, purchased of *Temple* a Life Annuity of £800 on personal Security for £8000. *Thistlewood* recovered: *Temple* Two Years afterwards became a Bankrupt: the Annuity was in Arrear: and the present Question was, to what Amount *Thistlewood* was entitled to prove under the Commission?

The Commissioners had valued the Annuity at £7200; grounding their Calculation on the prime Cost, the Lapse of Life, and the Time it had been enjoyed. Against this Valuation, the Opinion of an Actuary had been taken, who upon the *Quantum* of the Annuity, and the Age of the Grantee, stated its Value to be £10,000.

The present Petition was for an Order to be at Liberty to prove to that Amount.

Sir *Samuel Romilly* and Mr. *Montagu*, in support of the Petition, argued upon the Principle of the Actuary's Valuation, and contended that if this Annuity were worth £8000, when the Grantee was in an infirm State, it must be surely worth considerably more now that he had recovered.

Held, that although in ascertaining the Value of an Annuity, Regard ought to be had to the Price paid, and to the Time of Enjoyment, as Evidence of Value: yet as in this Case, the Probability was that the Purchase might have turned out to the Disadvantage of the Grantee; he ought to be allowed the Benefit of its having operated in his Favour.

Mr.

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Mr. *Hart* and Mr. *Bell* for the Assignees. The Commissioners have acted upon the Principles of this Court; the £8000 is decisive Evidence of what the Parties themselves considered to be the Value of the Annuity; and the Life having elapsed there ought to be a proportional Deduction. The Principle of Valuation is, that Relation should be had to the Price given. The Actuary's Calculation has no Regard to the Health of the Grantee, the Solvency of the Grantor, or the Nature of the Security; it proceeds not upon particular but general Grounds; the Price of an Annuity calculated by an Actuary, and what it will sell for, are rarely found to coincide.

Mr. *Cooke* (*Amicus Curiæ*). I am confident it has been decided that a Value should be set, Regard being had to the Price paid.

The Lord CHANCELLOR.

Still the Difficulty is what is meant by Regard being had to the Price paid. It must always be a Point of Evidence. In the Case of *Le Compte* (*a*), the Commissioners were directed to set a Value upon the Life, which is exactly what the Petitioner wants. *Heathcote* v. *Paignel* (*b*) did not decide that the Market Price was the Rule of Valuation; that Question was not brought before the Court. It occurred to me, as it did to Mr. *Cooke*, that there is some Decision on this Subject, but I have much Doubt whether it will govern this Case, in which there is much Peculiarity. The Commissioners seem to have had Regard to the 49th of the King, which it is not necessary to resort to in this Case, because here was a Forfeiture of the quarterly Payments before the Bankruptcy; it therefore came within the ordinary Doctrine of the Court. *Thistlewood* applied to prove more than the £8000, and

(*a*) 1 *Atk.* 251. (*b*) 2 *Bro. C. C.* 107.

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now comes here to claim the precise Sum of £10,000, exclusive of Arrears. This the Commissioners have refused, because they say, in ascertaining the Value, Regard ought to be had to the Sum paid for the Annuity and the Time which the Annuity has been paid to the Person who claims it. I agree that Regard ought to be had to the Price and to the Time of the Enjoyment, because those Circumstances are Evidence of the Value but it requires a great Deal of Consideration to say how far that Evidence is to operate; and the Commissioners have not explained in what Manner they have applied that Principle, or what has been the Nature of the Regard which they have had to those Two Circumstances. The Actuary on the other Hand proceeds on a different Principle, taking the Price of an Annuity of that Value, for the Life of a Man of that Age, without any Regard to the Price paid, the Time of the Enjoyment, or the Nature of the Security. It is clear to me, that in the Contract between these Parties, this Annuity must have been sold without any Reference to an Actuary. If *A.* and *B.* agree that one shall grant, and the other shall take an Annuity at the Market Price, there the Question is not what it is worth, as between Grantor and Grantee, but what is the general Price, and in that Sense I use the Term Market Price. But it is clear that this Annuity was not bought at the Market Price; because, when the Actuary, Two Years after, looking at the Age of the Parties only, states £10,000 to be the Market Price, there is Demonstration that £8000 could not have been the Market Price Two Years before: and if the Rule be, that a Man buying at the Market Price shall prove at the Market Price, it cannot apply here. If it is insisted that it was bought with reference to *Thistlewood's* Indisposition, it must be admitted, that if you are to look at that Circumstance, as taking it out of the Market Price then, you must look at the Value independent of the Market Price now.

We

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We know that Annuities are frequently valued in Bankruptcy, and in the Distribution of Assets in this Court, but I am unable to find, that either the Commissioners or the Masters have any fixed Practice in this Respect. What therefore is to be done? In moral Justice the Result is obvious. If I *Thistlewood* make on *Temple* this Proposition,—I should give you Fifteen Years Purchase for an Annuity on my Life; but my Life is bad; I think that Sum too much; I will give you £8000 for £800 a Year; and if *Temple* without consulting Medical Men had agreed, if *Thistlewood* had died a Year afterwards, *Temple* might have properly kept the £8000; then what Right has he to say, you have become convalescent, and shall not have the Advantage of that Contingency on your Part?

In the original Cases in Bankruptcy, if I rightly understand them, they considered the Penalty as the Debt; the Debt gave you a Right, if there were Assets, to receive the Annuity from Time to Time out of Dividends set apart for that Purpose. If therefore the Annuitant had become a healthy Man, his Right, at the Age of Thirty-four, under the Bankruptcy, would have sold for more than his Right at the Age of Thirty-two, before the Bankruptcy. Of late, however, the Penalty has been considered as the Security, and the Proof, as a Matter of Convenience, has been received only to the Value of the Annuity. In *Ex parte Le Compte* (*a*) Lord *Hardwicke* says, you must set a Value upon the Life; he never could have considered the Payments as reducing the Annuity, because in that View, the Payments might have reduced the Annuity to nothing. I agree with Mr. *Bell*, that the Value of a Life is a very difficult Subject of Inquiry for a Jury; but suppose *Thistlewood* had insured his Life at the Age of

(*a*) 1 *Atk.* 251.

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Thirty-two, for £4000, and afterwards at Thirty-four, for another £4000. A Jury, in an Action on the Policy by his Executors, must have tried the Question of insurable Life or not, at Two distinct Periods. And that on the Evidence of Medical Men. Mr. *Bell* tells me, I must consider the Risk run, and the Benefit enjoyed; but how am I able, unless I can ascertain the future Enjoyment, appreciate the Benefit enjoyed? If I am to take the Market Price at the different Ages of Thirty-two and Thirty-four I can easily ascertain the Difference; but if the Transaction did not originally proceed on the Market Price, if afterwards value it by that Standard, I do it on a quite different Ground, and uncontrolled by the Contract between the Parties. In *Heathcote* v. *Paignon*, Lord *Kenyon* would not listen to this Doctrine; I in that Case pressed this Distinction, that there was no Intention to buy and sell at the Market Price; that the Court was deciding upon a Principle that ought not to govern the Contract. It afterwards came on before Lord *Thurlow;* I am sorry he so decided *it,* without saying any Thing about the Market Price, and that he left it as an Authority so decided (*a*). In the Absence of any Case in the least governing this, all that I shall do at present is to refer it to the Master, to set a Value upon this Annuity at the Time of the Bankruptcy, taking all Circumstances into Consideration.

Aug. 12.

The Master reported the Value of the Annuity to be £10,000 upon Mr. *Morgan*'s Calculation. The Assignees excepted to the Report, and it now came on upon that Exception.

The Lord CHANCELLOR.

The Act of Parliament (*b*) has nothing to do with this Case, nor with any Case farther than this; before the Act

(*a*) 2 *Bro. C. C.* 167. (*b*) 49 *Geo.* III. c. 121, s. 17.

if

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if the Annuity had been secured by a Covenant, or by Bond, and was in Arrears, the Value of the Annuity could have been proved, but otherwise not; and the Act only superseded the Necessity of the Penalty having been incurred. Nothing more was intended than that the Commissioners should deal with Annuities which were not forfeited, as they were in the Habit of dealing with Annuities forfeited before the Act.

The Question is of more Importance than one that merely belongs to Bankruptcy; it is connected with every Case under a Will, where there is not sufficient to pay all Legacies and Annuities; in that Case they all abate, the Legacies by a very simple Calculation; the Annuities are valued, and you give the Annuitant a Proportion. The Deficiency upon an Annuity, in the Case of Assets, approaches nearly to the Case of a Man who cannot make good his Security; and I believe you will find uniformly that the Value is fixed upon the Calculation of an Actuary. If the Practice be so, it almost amounts to a judicial Declaration. I believe I am right in saying that Fifteen Years Purchase is the Market Price of an Annuity for a Man's own Life; the Petitioner has given Ten Years Purchase for an Annuity on his Life, secured by Bond and Judgment. The Reason of the Difference of Price between Ten and Fifteen Years is this; you, *Thistlewood*, are of a bad Life; I grant you an Annuity for Ten Years Purchase, because you are not likely to endure so long; if he does, what Right has the Grantor to complain? If, on the other Hand, *Thistlewood* had been strong and healthy, and had given Fifteen Years Purchase and died, could his Representatives have complained? Then, what Right has the Grantor, since the Converse has happened, to complain? The Price which such an Annuity may fetch in the Market may be in Point of Law, but it never can be in Point of Justice, the Standard between the Parties.

I shall

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* *Aug.* 17.

* I shall decide this Case on the special Circumstance £8000 is not the ordinary Price of an Annuity for 'Man's own Life, which I have always understood to b Fifteen Years, but, in this Case, the Grantee was in suc a State of Health that no Office would insure his Lif It was formerly thought that the Market Price was good Criterion of Value, upon the Principle that th Worth of an Annuity was as well evidenced by what O Party thought proper to give, and another to take, as any other Circumstance whatever. In this particul Case, it appears to me that I should do great Injustic when the Price given and taken was, with reference to t State of Health, to estimate it by what it would sell fo as the Purchase might in fair Probability have proved d advantageous to the Petitioner, he should have the Bene of its having operated in his Favour. Upon that Princi I think the Price given in the Master's Report is righ and in order to prevent any Mistake, I shall embody th Principle by a Declaration in the Order. Declare that it appears the Grantee's Life at the Time of the Purchase was not insurable, and that the Sum of £8000 is understood not to be so many Years Purchase as is given for a similar Annuity by a Person in sound Health; that he is now in sound Health, and therefore under such and all the Circumstances in the Master's Report mentioned, and having Regard to the Age and improved Health of the Grantor, let him prove for the Amount as reported by the Master.

Ex

Ex parte GELLAR and ANOTHER.—In the Matter of HUTCHINSON.

LINCOLN'S INN HALL, *August*, 1812.

A. and *B.* trading under the Firm of *A.* and Co. agree with *C.* to purchase Coffee on a joint Account. *A.* and Co. to have the Management of it. *A.* and Co. purchase the Coffee, and *C.* pays them for his Share. *A.* and Co. without the Consent of *C.* deposit the Coffee with *D.* who advances Money on it, and ignorant that *C.* is concerned in it, debets *A.* and Co. with the Advances. The Coffee is sold at a Loss: a Commission issues against *A.* and *B.* and another against *C.*; *D.* entitled to prove his Balance beyond the Proceeds, against the Estate of *C.* as well as against the Estate of *A.* and *B.*

SILL and *Watson*, trading together at *Liverpool*, under the Firm of *Sill* and Co. entered into an Agreement with *Hutchinson*, to purchase a Quantity of Coffee, to be shipped for a foreign Market, on a joint Adventure, under the Management of *Sill* and Co. The Coffee was bought by *Sill* and Co. and paid for by their Acceptances, and *Hutchinson* paid them for his Proportion of it. The Coffee was delivered by *Sill* and Co. to the Petitioners, for the Purpose of being exported; and they advanced Money upon it to *Sill* and Co. The Coffee was afterwards sold at a Loss. A Commission had issued against *Sill* and Co.; and a Commission also against *Hutchinson:* the Object of the present Petition was for Liberty to prove the Balance of the Advance beyond the Proceeds of the Coffee, against the Estate of *Hutchinson*, as well as against the Estate of *Sill* and *Watson*.

Hutchinson, by his Affidavit, denied all Knowledge of any Advances having been made by the Petitioners to *Sill* and Co. it was admitted that they were ignorant of his being interested in the Coffee, and the Entries in their Books were made to the Debet of *Sill* and Co.

Sir *Samuel Romilly* and Mr. *Daniel*, in support of the Petition, submitted, that as the Partnership was not disputed, *Hutchinson* must be bound by the Act of his Copartners.

Mr.

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Mr. *Hart* and Mr. *Cullen*, for the Assignees of *Hutchinson*, contended, that Partners were only bound by the Acts of each other, in the ordinary Transactions of their Business. *Sill* and *Watson* had no Dealings with *Hutchinson*, except in this single Speculation, and even of his Interest in this, the Petitioners were ignorant. There was no express Contract for his Liability, and the Court would not imply one.

The Lord CHANCELLOR,

After stating the Petition, said, it is in vain to argue in this Case, that there has been a Loss; Mr. *Hutchinson* must be liable for the Loss, if he were to have shared in the Profits. I think this Transaction binds the Three whether the Petitioners knew any Thing of *Hutchinson* or not, he had an Interest which made him liable to this Engagement. It is the Consequence of a Person suffering others to deal impliedly with his Name under the general Designation of a Company.

LINCOLN'S INN HALL, *August*, 1812.

In the Matter of WALTER WOOD and OTHERS.

Commissioners permitted under particular Circumstances, to receive an Affidavit of the Act of Bankruptcy, made before a Master extraordinary.

A SEPARATE Commission had issued against *Walter Wood*, who carried on Business in Partnership with several other Persons, and he had been found a Bankrupt. A joint Commission was afterwards taken out against him and his Partners. The Witness who had proved the Act of Bankruptcy against *Wood*, and who alone could do so, was in *Cumberland*, upon Business of Importance. The present Application was to permit the Commissioners to receive an Affidavit of the Act of Bankruptcy made by him before a Master extraordinary.

The

The Lord CHANCELLOR enquired, whether the second Commission had issued to the same Commissioners, and being answered in the Affirmative, made the Order.

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Ex parte WHITBREAD and OTHERS.—In the Matter of SHAW.

LINCOLN'S INN HALL, *August*, 1812.

THIS Petition stated, that the Bankrupt had deposited the Lease of certain Premises with the Petitioners as an equitable Mortgage to secure a Loan of £400; and it prayed a Sale of the Lease in the usual Manner, and with the usual Directions.

The Doctrine of equitable Mortgage by Deposit of Deeds, is not to be extended. In this Case a Man having advanced Money upon the Security of a Lease, at the Time deposited with another Creditor, it was held, that there was no Lien beyond the Debt of the first Depositary.

A Person of the Name of *Temple* also claimed a Lien on the same Premises for the Sum of £250; he stated by his Affidavit, that the Bankrupt applied to him for the Loan of £250, in order to complete the Amount of his Purchase-money for the Premises, the Petitioners having agreed to advance the Remainder; that he went with the Bankrupt to the Counting-house of the Petitioners, and there saw their principal Clerk, and it was agreed between them, that, as the Petitioners were to advance the larger Sum, they should have the Possession of the Lease, which, however, was to be likewise subject to his *(Temple's)* Claim.

Mr. *Cullen* in support of the Petition. Mr. *Montagu* for the Assignees. Mr. ——— for *Temple*.

The Lord CHANCELLOR.

I certainly never should have made the Decisions upon which the Doctrine of equitable Mortgage has been established,

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blished, but I must act upon their Authority. Before these Decisions, the Statute of Frauds (*a*) had said, that no Leases, Estates, or Interests, either of Freehold or Terms of Years, should be granted or surrendered, unless by Deed or Note in Writing, signed by the Party or their Agents; or by Operation of Law.

The Object of the Statute was to prevent what we have frequently seen, such contradictory Statements, as leave the Mind of the Judge called on to decide in a perfect Doubt as to what the Nature of the alleged Agreement is. Shortly after the Statute, the Court would not allow, even if all the Parties were consistent in their parol Agreement, such an Agreement to be established: because if they did so in a clear Case, they must have done so in a Case less clear, through all the different Gradations of more or less Certainty, till it would at last have depended on a mere Question of Swearing. Prior to these Cases, the Parties had a Right to say they had an Interest in the Title Deeds, though none in the Land; and a Person with such an Interest might say, as you cannot part with your Estate without paying me, I will, by Means of that Embarrassment, work out my own Satisfaction. So in Cases of specific Performance, the Court in some Instances said, you have admitted the Agreement, and though you rely on the Statute, your Admission of the Agreement has precluded all Danger of Perjury, and the Court will execute it. Later Decisions have receded from that Relaxation of the Rule (*b*): how we have slipped into this Laxity in Bankruptcy, I do not know. Lord *Thurlow* went no farther than that the Deposit of the Deed was Evidence of an Agreement; and he came to that Conclusion, by asking himself for what other Purposes could it have been deposited? I said, to give an Interest in the Title Deeds. But he never went

(*a*) 29 *Car.* II. c. 3. s. 3.

(*b*) *Vide* the Cases on this Head collected and well considered in *Font.* Equity, 178.

the

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the Length of saying, that the mere Deposit of the Deed with one Man should be Evidence of his being a Trustee for another. It may be otherwise, where the Depositary has himself advanced nothing; and if therefore there had been a concomitant Advance on the Part of the Person so claiming to be *Cestui que* Trust, and a Dealing with the Estate connected with that Advance, it might be considered as Evidence that the Depositary, advancing nothing, was a Trustee. I believe *Temple* to be morally entitled to this Interest; but how can I extend a Doctrine opening to so much Uncertainty? however hard it may be in an individual Case, it is better upon Principles of public Utility to say, that those who wish to render such Securities valid, have only to require a short Memorandum in Writing (*a*).

(*a*) *Ex parte Combe, Ex parte Warner, ante,* 268, 287.

LINCOLN'S INN HALL. *August,* 1812.

Ex parte WHITAKER.—In the Matter of FRY.

A. purchases an Annuity of £200, for £2000 to be paid after her Death. The Grantor becomes Bankrupt; and is indebted to her in £2275 : 5*s* : 9*d*. The Annuitant is not entitled to set off the £2000, against the £2275 : 5*s* : 9*d*. For as she could not be compelled to pay in Advance, the Bankrupt ought not to be compelled to take in Advance.

THE Bankrupt *Fry* had sold to the Petitioner *Penelope Whitaker* an Annuity of £200 for her Life, in Consideration of £2000 to be paid by her within Six Months after her Death; and it was agreed, that if she should think proper at any Time during her Life to pay the said Sum of £2000, or any Part thereof, then she should be entitled to a farther additional Annuity of £5 *per Cent.* for every £100, which she should so pay.

During the Years 1810 and 1811 the Petitioner paid to *Fry* several Sums of Money, amounting in the whole to

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about £2275 : 5*s* : 9*d*. for the Purpose of being laid out and invested in the Purchase of certain Water-work Shares, but before such Purchases were made *Fry* became a Bankrupt.

The Petition prayed that the Value of the £2000 payable at her Death might be ascertained by the Commissioners, and that it might be set off against the said Sum of £2275 : 5*s* : 9*d*. and the Value of the Annuity; and that she might prove for the Difference.

Mr. *Richards* and Mr. *Newland*, in support of the Petition, submitted that as the £2000 was not merely contingent, but to be paid on the Death of the Petitioner, it could as readily be ascertained as the Annuity itself, and ought in Justice to be set-off. *Ex parte Mitford* (*a*).

Mr. *Montagu* for the Assignees, contended that this being a Debt depending upon Death it could not be set-off; at the Moment of the Bankruptcy there was no certain Sum due from her to *Fry*; *Ex parte Mitford* has been long over-ruled.

The Lord CHANCELLOR.

Aug. 17. My Difficulty is this; if she could not be compelled to pay you in advance, what Right has she to make you take in advance? it is a nice Point. I am not aware that it is covered by any Decision. I think the Petitioner is entitled to prove for the Value of her Annuity; but the £2000 is to be paid by her Executors after her Death. It is impossible to anticipate it and make it a Matter of set-off.

(*a*) 1 *Bro. C. C.* 398.

Ex

Ex parte MOLINE. 1812.

IN this Case the Point was, the Acceptor having said at Eleven o'Clock in the Day that he would not pay the Bill, whether the Holder could immediately resort to the Drawer?

The Lord CHANCELLOR was of Opinion that he could.

Sir *Samuel Romilly* mentioned *Burbridge* v. *Manners*, 3 *Camp.* 194. S. P.

Ex parte LONGMAN and OTHERS.—In the Matter of TABART.

LINCOLN'S INN HALL, *August*, 1812.

Joint Creditors under a separate Commission are not entitled to have the Expenses of a Solicitor, employed by them to conduct Examinations, &c. before the Commissioners, paid out of the joint Fund.

TABART and *Drake* were Partners; *Drake* was abroad, and a separate Commission issued against *Tabart*; the usual Order had been obtained for keeping distinct Accounts.

This was an Application by the joint Creditors, that a Solicitor employed by them for the Purpose of conducting certain Examinations before the Commissioners, might be paid by the Assignees out of the joint Effects.

Sir *Samuel Romilly* and Mr. *Cullen*, in support of the Petition: It is not denied that the employing of a Solicitor on the Part of the joint Creditors has been much for their Advantage,

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Advantage, and indeed was necessary for the general Administration of the Bankrupt's Affairs under the Commission; it is perfectly fair that Expenses incurred for the Benefit of the joint Creditors should be paid out of the joint Effects.

Mr. *Hart* and Mr. *Montagu, contra.* The Question simply is, whether one Solicitor is not adequate to the Duties of one Commission? If the joint Creditors were dissatisfied with his Conduct, they ought to have called on the Assignees to remove him; and in their Default they could have applied to your Lordship to appoint other Assignees. This Petition is without Precedent; if it succeeds, the Expense of working Commissions will be doubled.

The Lord CHANCELLOR.

This is the first Application of the Kind, and I think it would establish a most dangerous Precedent to accede to it: it is a Rule that joint Creditors shall not vote in the Choice of Assignees under a separate Commission. If you admit a different Administration you take away that Guard which the Court has thought fit to interpose. The Solicitor is quite safe; he must be paid by those who have employed him; and I think in fairness the joint Creditors ought to contribute and sufffer it to be paid out of the Dividends; but this Petition must be dismissed, and with Costs.

The Costs were allowed out of the joint Estate.

Ex

LINCOLN'S INN HALL. *August*, 1812.

Ex parte ADAMS.—In the Matter of STEWART.

Partners, constituting distinct Firms, may prove against each other. But in a Partnership of Two, one carrying on Business separately, as they are both liable for the same joint Debts, the solvent Partner is not entitled to prove, under the Bankruptcy of his Co-partner, a Debt for Goods sold by his distinct House to the Firm, until the joint Creditors have been satisfied.

ADAMS and *Stewart* carried on Business as Saddlers in *London*; and *Adams* carried on a distinct Trade as a Manufacturer of Saddlers' Ironmongery, at *Walsal* in *Staffordshire*. The House in *London* was supplied with Articles from the Manufactory by *Adams*, for which was agreed that he should be paid at the Expiration of every Half Year, by a Bill at Six Months. In the Books kept by the *London* House *Adams* was credited for all Goods sent by him to the House, and debited for all the Monies paid to him; and in the Books at *Walsal* the *London* House was debited for all the Goods supplied, and credited with Cash paid. On the 31st of *March* 1811, *Adams* died, having appointed the Petitioner his Executor. In *January* last a Commission issued against *Stewart* as surviving Partner of *Adams*. The Petitioner had applied to prove under the Commission the Sum of £3722 for Goods sold and delivered by his Testator to the House, but the Commissioners refused to admit him. He now applied that he might be at liberty to call a Meeting to prove the Debt, and that the Commissioners might keep distinct Accounts, &c.

Sir *Samuel Romilly* and Mr. *Montagu*, in support of the Petition.

Mr. *Leach* and Mr. *Agar*, *contra*.

The Lord CHANCELLOR.

I am authorized to consider these two Houses as distinct Houses of Trade; but it is impossible to say what *Adams's*

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Ex parte ADAMS.—In the Matter of STEWART.

Adams's Representatives are entitled to prove till the joint Estate has been applied to the joint Debts. In none of the Cases in which the Partner, constituting a distinct House, has ever been admitted to prove, has the Estate against which he has been admitted been liable with that distinct House for joint Debts. I know no Case where a solvent Partner has been admitted to prove against Creditors who have a Demand against him. In the Case of a Firm of *A. B. C.* and *D.* proving against the firm of *A. B. C.* and *E.*, *A. B. C.* and *D.* are not liable for any joint Debts with *A. B. C.* and *E.* The Petitioner is entitled to call for a specific Application of the joint Effects to the joint Debts; and he may by that Equity draw more from *Stewart*'s Estate than he can by his Proof (*a*).

Let an Account be taken of the joint Estate, and let it be applied in Satisfaction of the joint Debts. Let the Petitioner make a Claim against the separate Estate of the Bankrupt, without Prejudice, and receive Dividends in case he may eventually have a Debt against the separate Estate. Reserve the Consideration of what is to be done in case the joint Estate does not pay every Body, and the Costs of the Enquiry.

(*a*) *Vide Cooke*'s Bkt. Law, 538.

Ex parte LORD SEAFORTH and ANOTHER.—In the Matter of WILKINSON.

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IN the Month of *February* 1810, the Petitioners, as the Executors of General *Fraser*, caused his Leasehold House to be advertised for Sale by Public Auction; and in the Particulars it was stated, that the Purchaser might take the Furniture at a Valuation, or otherwise that it would be sold by Auction on the Premises. Previous to the

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Ex parte Lord SEAFORTH and Another.— In the Matter of WILKINSON.

the Sale *Wilkinson* agreed to take the House from *Lady-day* ensuing for £2400, and the Furniture, &c. at a Valuation, which the Appraisers afterwards made at £1970; the Assignment was executed, but neither it, nor the Lease, nor Possession had been delivered. *Wilkinson* declined to complete the Contract. The Petitioners brought an Action and obtained Judgment for £4370, the Amount of the House and Furniture, and Costs £41 : 10*s.* A Commission issued against *Wilkinson*, and the Messenger was sent into Possession of the House. The Petitioners then sold the House and Furniture, &c. for £2893 : 18*s.* They now prayed to be declared entitled to retain the £2893 : 18*s.* and to prove for the Difference between that Sum and £4411 : 10*s.* the Amount of the Judgment and Costs, and that the Assignees might in the mean Time be directed to retain Dividends in respect of such Proof.

Sir *Samuel Romilly*, and Mr. *Cooke*, for the Petitioners, urged that they were entitled by way of Lien to the Amount of the Sale, and to a Proof for the Difference.

Mr. *Hart* and Mr. *Wetherell contra*, contended that whatever Lien there might be on the Lease, there could be none on the Furniture; and that the Petitioners were concluded by their Action.

The Lord CHANCELLOR.

The Action is upon the Agreement to assign the House and Furniture; there are Counts for Chattels bargained and sold, but none for Goods sold and delivered. In an Action of Trover, though you aver the Property to be in the Plaintiff, it is a Defence to the Action that there is a Lien in the Defendants. It appears to me that the Petitioners are entitled to this Lien, but I do not wish to conclude the Assignees if they think it right to have the Opinion of a Court of Law.

LINCOLN'S INN HALL, *August*, 1812.

Ex parte WRIGHT.

The Lord CHANCELLOR.

A. purchases an Annuity of *B.* secured upon Lands in Fee-simple, falsely represented to be of equal Value with the Annuity, and under that Representation not inrolled. Upon a Petition to prove for the Value of the Annuity, the *Chancellor* gave Liberty to prove, without Prejudice to a Bill, reserving Dividends. How far in a Case of Fraud, the Provisions of the Annuity Act might be dispensed with, not as against the Grantor, but against his Creditors?

THIS comes before me on a Petition disclosing these Circumstances. In 1810, the Petitioner having Property to the Amount of £1850, was desirous of investing it in an Annuity for the joint Lives of himself and his wife; and he applied to the Bankrupt, who was his Attorney for that Purpose. The Attorney proposed himself as the Grantor of an Annuity of £210; and he delivered to him certain Proposals in Writing, (which Sir *Samuel Romilly* said amounted to an Agreement; but if so they want the Stamp) for an Annuity of £210, to be secured on Estates in Fee, then belonging to the Bankrupt, naming them of the annual Value of £210; just the Value of the Annuity. The Petitioner agreed to accept it on those Terms; on the 1st of *August* 1810, he gave him in Part of the Purchase-money £650; on the 8th of *August* £550, when a Part of the Deeds was deposited; and on the 14th of *August* £650, when the Remainder of the Deeds was deposited, and a regular Grant of the Annuity charged on the Premises was executed. If this were a Grant that did not fall within the Exception in the Annuity Act (*a*) a Memorial of it should have been registered. I should hope that the Bankrupt was not aware that this was necessary; for although he is a Grantor in Fee-simple, yet here is a gross Mis-statement as to the annual Value; the Premises are worth less than the Annuity: and the Grant is to all Intents and Purposes void.

(*a*) 17 *Geo.* III. c. 26. § 8.

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Ex parte WRIGHT.

The Petitioner now comes here to prove the Value of an Annuity, when in Point of Fact he has no Annuity. How far it may be possible where a Man proposes to be the Grantor and the Man of Business on both Sides, holding himself out to act with strict Honesty, how far it may be possible in a Case of gross Fraud and Neglect, to put the Statute out of the Question, and to raise this Demand of an Annuity, not against the Grantor, but his general Creditors, distinguishing between equitable Titles flowing out of Contract, and those out of Fraud, I am not prepared to say. I think I could do no more than tell him to file a Bill: it has been argued that the Proposals acceded to should be considered as an Agreement, that till an Annuity was granted, the Deeds were to be a Deposit: but that Argument must go further, and contend, that till actual Enrolment the Deeds were to be a Deposit. The first Difficulty is, what is the Meaning, and the second, what is the Remedy? The Case has been assimilated to a Deposit of Deeds, till a Mortgage; but there is this Difference: where Deeds are deposited till a Mortgage, they are Evidence of an Agreement; and an equitable is as good as a legal Mortgage; but I cannot say he is a Mortgagee. If he thinks proper to file a Bill, and will intimate that he is advised so to do, I will make an interim Order. If he has the Deeds, and it does not appear, whether he has or not, the Assignees will find it difficult to take them from him. It is a very fit Case for a Compromise. All I shall now do, is to give him Liberty to prove without Prejudice to a Bill, and let the Dividends be reserved.

LINCOLN'S INN HALL, *August*, 1812.

Ex parte BEDDAM.—In the Matter of SHEPHERD.

The *Lord Chancellor* has not Jurisdiction in Bankruptcy, to order an infant Heir of a deceased Assignee, to convey, as an infant Trustee, the Estates of the Bankrupt vested in him, by the Decease of his Ancestor. But the Petition was amended, and the Order made under the Statute 7 *Anne*, c. 19.

THE Bankrupt being seised in Fee of a real Estate, had mortgaged it, first to a Person of the Name of *Baker*, and afterwards to a second Mortgagee of the Name of *Munday*. The Assignee under the Commission and the Mortgagees entered into a Contract for the Sale of the Estate; but before the Conveyance was executed, the Assignee died, leaving an infant Heir.

The present Petitioner had been chosen Assignee, and now applied that the Heir of the late Assignee might be directed to execute the Conveyance as an infant Trustee under the Statute (*a*).

Mr. *Rose* in support of the Petition.

The Lord CHANCELLOR

Was of Opinion that he could not make the Order in Bankruptcy; but permitted the Petition to be amended, as an Application under the Statute.

It was amended accordingly, and the order obtained (*b*).

(*a*) 7 *Anne*, c. 19.

(*b*) To have obtained the Order in Bankruptcy, the Petition ought to have prayed, that the Bargain and Sale to the first Assignee might be vacated, and a new one executed. *Vide ex parte Bainbridge*, 6 *Ves.* 451: *ex parte Leman*, 13 *Ves.* 271.

LINCOLN'S INN HALL, *August*, 1812.

Ex parte DU FREME.

An Order by the *Lord Chancellor* to enlarge the Time for a Bankrupt's surrendering to pass his last Examination, must be made Six Days before the Expiration of the Forty-second Day.

THIS was a Petition, that the Bankrupt's last Examination, which stood for this Day, might be postponed.

Mr. *Montagu* in support of the Petition, admitted, hat strictly the Order (*a*) for that Purpose ought to be ade Six Days before the Time fixed for the last Examinaon; but in the present Instance the Bankrupt disputed e Validity of the Commission, and had presented a Petion for a Supersedeas: that Petition, however, having been ntered too late for these Sittings, stood over till the next etition-day. He submitted, that under these Circumances there was a Discretion in the *Chancellor* to postone the Examination.

The Lord CHANCELLOR

Thought that he had not the Jurisdiction; and refused o make the Order, as opening to much Mischief.

(*a*) 5 *Geo.* II. c. 30. s. 3.

Ex

LINCOLN'S INN HALL, *August*, 1812.

Ex parte HOWELL.—In the Matter of HOWELL.

A Solicitor may sue out a Commission upon his Debt for Costs, without, as in the Case of an Action, having delivered his Bill One Month previous thereto, but it is quite of course. After the Commission to refer such Bill to the Master to be taxed.

THIS was the Petition of the Bankrupt to supersede his Commission.

The petitioning Creditor had been employed by the Bankrupt as his Attorney to bring Actions, &c. and had sued out the Commission without delivering his Bill, or rendering any Account of his Receipts and Payments to the Bankrupt.

Mr. *Richards* and Mr. *Wray*, in support of the Petition.

Sir *Samuel Romilly*, for the petitioning Creditor.

The Lord CHANCELLOR

Said, that although the Legislature had required a Solicitor to deliver his Bill a Month before the bringing of an Action on it, yet the Statute did not apply to the Case of suing out a Commission of Bankrupt. That it might be of most iniquitous Consequence if it did, as a Solicitor would be in a worse Situation than other Creditors, who would sweep away every Thing before the Solicitor could interfere. But that it was quite of course upon a Petition to refer the Bill to the Master to be taxed after the Commission, if it had not been previously delivered for that Purpose. The Order therefore was to refer the Bill to be taxed, reserving all further Directions till after the Master's Taxation.

Ea

LINCOLN'S INN HALL, *August*, 1812.

Ex parte CAWKWELL.—In the Matter of PAGET.

THE Object of this Petition was, that a Deed of Assignment by *Paget* to Trustees of all his real and personal Estate for the Benefit of his Creditor might be delivered up by the Trustees, to enable the Commissioners to declare it to be an Act of Bankruptcy. The Affidavits were most contradictory, as to whether the Petitioner, who was the petitioning Creditor, had assented to or acted under the Deed: he had never executed it.

Mr. *Leach* objected, that the *Chancellor* had no Jurisdiction to compel the Production of a Deed, in order to afford Evidence of an Act of Bankruptcy.

Sir *Samuel Romilly* and Mr. *Wray*, *contra*.

The Lord CHANCELLOR.

I have no Doubt of my Jurisdiction to direct the Production of the Deed, and to compel all Parties to attend to be examined concerning it; and it is equally clear, that if the Petitioner had acted under the Deed, although he may not have executed it, he not only cannot avail himself of it as an Act of Bankruptcy, but will be liable to all the Costs of the Commission.

It was ordered, that the Trustees should go before the Commissioners, produce the Deed, and submit to be examined concerning it; and an Inquiry was directed, whether the Bankrupt, at the issuing of the Commission, had committed any and what Act of Bankruptcy of which the Petitioner could take Advantage, reserving all further Directions to Costs.

The *Chancellor* has Jurisdiction to order the Trustees in a Deed of Assignment of all the Trader's Effects, to produce it before the Commissioners for the Purpose of proving an Act of Bankruptcy. But if the petitioning Creditor has acted under the Deed, although he may not have executed it, he cannot avail himself of it as an Act of Bankruptcy, and will be liable for the Costs of the Commission.

Ex

1812. *Ex parte* WARD.—In the Matter of BROMBLEY.

THIS was the Petition of the petitioning Creditor in another Commission against the same Bankrupt by the Name of *Brombly*, to supersede the present Commission which had subsequently issued against him by the Name of *Brombley*.

The Affidavits proved, that the Bankrupt was in the Habit of spelling his Name *Brombly* without the *e*; that the Docket *Brombly* had been struck before that against *Brombley* was applied for; that the Description of the Bankrupt was alike in both; that there was no other Person of the same Description named either *Brombly* or *Brombley*, and that the Person applying for the second Docket must have known the Persons to be the same.

The Lord CHANCELLOR.

It is the Practice at the Office to consider the Variation of a Letter as sufficient to allow a second Docket to be struck; but this Solicitor must have known the Party to be the same.

Let the second Commission be superseded at the Costs of the Solicitor who took it out.

LINCOLN'S INN HALL, *August*, 1812.

Ex parte JEFFERY.—In the Matter of HOOPER.

The Choice of Assignees under a separate Commission not disturbed, upon the Ground that they had been elected by joint Creditors, who had been admitted on the Proceedings as separate Creditors. *Secus* if they had been admitted and voted as joint Creditors.

THE Object of this Petition was to expunge the Proof of Debts, allowed to be joint Debts of the Bankrupt, and one *Harbin*, with whom he was formerly in Partnership, and to proceed to the Choice of new Assignees, in the Room of those elected by the Votes of such joint Creditors. The Debts appeared upon the Proceedings to have been all admitted as separate Debts, and not as joint Debts, and in fact Two of them were on written Securities, which were separate as well as joint.

Mr. *Leach* in support of the Petition, contended, that there being a solvent Partner, the Creditors on the Securities could not be admitted to prove; and that as to their having been admitted as separate Creditors, that did not make any Difference, if in fact they were joint.

Sir *Samuel Romilly* and Mr. *Wray, contra*, contended, that it had been long settled, that a new Choice of Assignees should not be ordered, merely because the Commissioners had admitted joint Creditors to prove as separate; that it might be different if they had voted as joint Creditors; here they had proved as separate Creditors; and there would be no End to these Questions, if Debts might be so impeached; besides Two of them were on joint and separate Securities.

The Lord CHANCELLOR

Said he was clearly of Opinion, that the Proof on the joint and separate Securities were good; and as to the Fact of the others being joint Creditors, the Commissioners had admitted

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Ex parte JEFFERY.— In the Matter of HOOPER.

admitted them as separate Creditors, and he would not disturb the Choice of Assignees, by an Inquiry whether they were properly joint or separate; that it would have been different if they had been admitted and voted as joint Creditors.

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Ex parte. RIDGE.

THE Bankrupt was a Lessee for Twenty-one Years of a Farm on which was a Lime-kiln, and which he worked as a Lime-burner. The Question upon a Petition for a Supersedeas was, whether he was a Trader (*a*)?

Mr. *Leach*, Mr. *Cullen*, and Mr. *Parker*, for the Petition, relied on *Sutton* v. *Weeley*, 7 *East*. T. R. 442.

Sir *Samuel Romilly*, *contra*, admitted that the Commission could not be sustained.

The Lord CHANCELLOR.

Supersede the Commission with Costs.

(*a*) There were Affidavits as to the Extent of the Dealing in Lime; but it was argued on the Principle, for which see the Case cited.

Ex

LINCOLN'S INN HALL, *Feb.* 1813.

Ex parte COCKS.—In the Matter of WILCOX and FRASER.

Interest out of the Surplus of a bankrupt Bankers' Estate, refused upon his Promissory Notes payable on Demand; as not being Debts carrying Interest, either by Contract, or on the Face of them.

THE Bankrupts had been Bankers at *Exeter*. This was a Petition to have Interest computed and allowed upon certain of their Promissory Notes, payable upon Demand, there being a Surplus of their Estate after Payment of Twenty Shillings in the Pound.

Mr. *Courtenay*, in support of the Petition, contended, that all Debts payable on Demand bore Interest from the Time of the Demand; *Lowndes* v. *Collins*, 17 *Ves.* 27 (*a*); and that Bankruptcy was equivalent to a Demand.

Sir *Samuel Romilly* and Mr. *Cooke*, *contra*, contended, that there had been no Instance in *Bankruptcy* of Interest having been given on any Debt, which did not on the Face of it stipulate for Interest, or that was not entitled to Interest at the Time of the Proof under the Commission. At Law, where Interest is allowed on Bills of Exchange and Promissory Notes, it is given as Damages. The Terms of all the Cases in Bankruptcy are Interest on Contracts and Notes carrying Interest, that is, Interest on the Face of them. *Ex parte Marlar*, 1 *Atk.* 151, *Bromley* v. *Goodere*, *ibid.* 80.

The Lord CHANCELLOR.

I have always understood the Rule in Bankruptcy to be, that Debts carrying Interest by Contract, and no other,

(*a*) "Wherever there is a "written Contract for a Sum of "Money payable upon Demand, "or upon a Day certain, Inte- "rest is payable from the Time "of the Demand made, or from "the fixed Period of Payment. "The *Master of the Rolls* in the "Case cited."

should

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should be entitled to Interest. In Truth, it is difficult to say on what Principle, even Debts carrying Interest by Contract, have been so far favoured. The Court however has admitted the Payment of Interest out of the Surplus, when it is provided for by the Contract. The Courts of Law give Interest, not as Interest, but as Damages calculated with reference to the Arrear of Interest. I think it better in Bankruptcy to abide by the Rule as I find it, than to introduce a new one.

I shall make the Order in the Terms of the Cases cited; and direct the Payment of Interest on Debts carrying Interest (*a*).

(*a*) "As the Commissioners "have established it as a Rule, "that Note Creditors have no "Right to *prove* Interest upon "them, unless it is expressed in "the Body of the Notes, I will "not break in upon this Rule. "Lord *Hardwicke*, in *ex parte* "*Marlar*, 1 *Atk.* 151." In *Bromley* v. *Goodere*, it was declared, that Creditors by Bonds, Contracts, or Notes, carrying Interest, were entitled to receive Interest on the Sums which were owing at the Time of the Commission, from the Day of its issuing till they received full Satisfaction. But upon the Bonds no Interest beyond the Penalties. In *ex parte Champion*, 3 *Bro. Ch. Ca.* 436, the Rule was confirmed; but Interest was there allowed on a Debt for a Balance of Account, the Course of Trade being considered as Evidence of the *Contract*. *Ex parte Mills*, 2 *Ves.* jun. 295, was an Application for Interest on Notes not specifying it, on the Ground that it was the Contract of the Parties that they should, and that the Omission was accidental. The Order directed, "Interest upon such "Debts, as either upon the Face "of the Security, *or by Force of* "*the Contract between the Parties*, "carry Interest." *Ex parte Hankey*, 3 *Bro. Ch. Ca.* 504.

Where a Commission was ordered to be superseded upon Payment by the Bankrupt to his Creditors of what a Master should report due, Interest was allowed from the Date of the Report upon Notes not carrying Interest in the Body of them, "as if it "were the common Case of a "Reference in a Cause." *Ex parte Rooke*, 1 *Atk.* 244.

Ex

Ex parte WHITESIDE. 1813.

THIS was an Application by a Creditor to be paid his Dividends which had been ordered under the Commission (*a*).

The Assignees resisted it, upon the Ground that his Debt ought not to have been admitted on the Proceedings.

Mr. *Leach* for the Petition.

Sir *Samuel Romilly, contra.*

The Lord CHANCELLOR.

The Assignees cannot refuse to pay the Dividends; if they objected to the Debt, they ought to have presented a Petition to expunge it.

(*a*) *Vide ex parte Graham,* in the Matter of *Mackenzie, post.*

Ex

1812.
Michaelmas Term.

Ex parte BURTON, FRANCO, and COREA.—In the Matter of KENSINGTON.

The Drawer of a Bill of Exchange, discounts it with his Banker, who became bankrupt before the Maturity of the Bill, having a Cash Balance of the Drawer in his Hands. Petition by the Drawer and Acceptor, that the Assignees might be restrained from proceeding at Law on the Bill, upon Payment to them of the Difference between the Cash Balance and the Bill dismissed.

BURTON was the Drawer, and *De Franco* and *Corea* were the Acceptors of a Bill of Exchange for £320, which *Burton* had discounted at his Bankers, *Kensingtons* and Co. They became Bankrupts before the Maturity of the Bill, having in their Hands a Balance upon *Burton*'s Account to the Amount of £310. The Bill came to the Hands of *Kensingtons*' Assignees, who intended to enforce the Payment of it. The Object of the present Petition was, that the Balance of £310 might *pro tanto* be applied in Satisfaction of the Bill; and that upon Payment of the Residue to the Assignees, they might be restrained by Injunction from proceeding in any Action on it.

Mr. *Leach* and Mr. *Montagu*, in support of the Petition. The Claim of the Petitioners is founded in Equity; the Word Credit will bring this Case within the Provision for set-off in Bankruptcy (*a*). There can be no Doubt as to the Jurisdiction, since the Decision in *Ex parte Rowton* (*b*).

Sir *Samuel Romilly*, *contra*, objected, first that the Court had no Jurisdiction; secondly, that this was not a Case of set-off.

The Lord CHANCELLOR.

What Right have the Acceptors *Franco* and *Corea* here?

Sir *Samuel Romilly*. If they are entitled to apply here

(*a*) 5 *Geo.* II. c. 30. s. 28. (*b*) *Ante*, p. 15.

by

by Petition, there is an End to all Bills for Injunction against Assignees. They are entirely Strangers to the Commission. *Ex parte Rowton* was decided on the Ground, that the Petitioners were in a Situation entitling them to go in under the Commission. This is a Discount of the Bill, not a Deposit. *Ex parte Hall* (*a*).

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Ex parte BURTON, FRANCO, and COREA.—In the Matter of KENSINGTON.

The Lord CHANCELLOR

Dismissed the Petition.

Ex parte HAMER.—In the Matter of HAYMAN and OTHERS.

LINCOLN'S INN HALL, *Dec.* 8, 1812.

A PETITION had been presented by joint Creditors under the Bankruptcy, stating that the Meeting for the Choice of Assignees had been adjourned from the 5th until the 12th of *December*; the Commissioners doubting, whether the separate Creditors who had insisted upon voting had a Right so to do. It was requested that the *Lord Chancellor* would be pleased to answer the Petition and order an Attendance on it, for some Day before the 12th of *December*.

Separate Creditors are not entitled to vote in the Choice of Assignees under a joint Commission.

The Lord CHANCELLOR,

On the Object of the Petition being stated to him, refused to order an Attendance; declaring that separate Creditors had no Right to vote in the Choice of Assignees under a joint Commission (*b*), and directed the joint Creditors forthwith to proceed to the Choice of the Assignees.

(*a*) 3 *Ves.* 304.

(*b*) *Vide* 1 *Christ.* Bank. Law, 250. *Ex parte Parr*, *ante*, p. 78.

Ex

LINCOLN'S INN HALL, 1812, *Dec.* 24.

Ex parte NUNN.—In the Matter of NUNN and BARBER.

A Creditor who holds a Security, and is desirous of voting in the Choice of Assignees, is entitled to have the Security taken at its Value, and to prove for the Difference.

NUNN and *Barber*, being indebted to the Petitioner in the Sum of £4600, surrendered to him certain Copyhold Premises, as a Security for his Debt. The Petitioner was desirous of proving under the Commission, for the Purpose of voting in the Choice of Assignees; but if his Proof were delayed until after the Copyhold Premises should have been sold, and the Residue of his Debt, beyond the Proceeds of that Sale, ascertained, the latter Object would be defeated.

The present Petition proposed, that the Security should be sold, as soon as the Assignees were appointed; but that in the mean Time it should be taken at the Value of £3000, which it was admitted to be; and that the Petitioner should prove for £1600. If the Sale of the Security produced more than £3000, it was to be carried to the Estate (*a*).

Mr. *Montagu* in support of the Petition, stated that this Practice had been adopted in some of the Lists of Commissioners, but in others not.

The Lord CHANCELLOR thought the Practice reasonable, and made the Order.

(*a*) *Vide ex parte De Tasted, post.*

LINCOLN'S INN HALL. *Jan.* 1813.

Ex parte ALCOCK and ANOTHER.—In the Matter of KENSINGTON (*a*).

A Covenant in a Marriage Settlement, to transfer Stock into the Names of Trustees, upon receiving One Month's Notice, with Liberty to the Trustees to forbear giving the Notice during the Life of the Covenantor, is a contingent Debt not proveable udnen his Bankruptcy. The Bankruptcy not being equivalent to, or superseding the Necessity of Notice.

THE Petition stated Indentures of Marriage Settlement, between *Kensington* of the first Part, the Petitioners as Trustees of the second Part, and the intended Wife of the third Part, in which *Kensington* covenanted with the Trustees, that he would at any Time after the Marriage, upon receiving One Month's Notice in Writing, or in his Default that his Representatives would, transfer £15,000 *Reduced Bank Annuities* into the Name of the Trustees, in the Books at the *Bank*, upon the Trusts of the Marriage. It was provided that it might be lawful for the Trustees to forbear calling for the Transfer during his Life; and it was declared, that the Wife accepted her Interest under the Settlement, in lieu of Dower. *Kensington* became bankrupt without Notice having been given or the Transfer made. The Trustees applied to prove it as a Debt: the Commissioners refused to receive it. The Object of the present Petition was, that the Proof might be directed to be received.

Sir *Arthur Piggott* and Mr. *Martin*, contended that the Debt was complete by the Marriage, the Notice being merely a Form to put an End to the Debt, and to call in the Money from the Husband, which was, from the Moment of the Settlement, a Debt to the Trustees.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wilson*, for the Assignees, insisted that the Debt was contingent, *ex parte King*, *ex parte Mare*, 8 *Ves.* 334, 335.

(*a*) 1 *V.* & *B.* 176.

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Ex parte ALCOCK and Another. In the Matter of KENSINGTON.

The Lord CHANCELLOR.

I am of Opinion, that this was a pure contingent Debt at the Bankruptcy: it is impossible to say that his Bankruptcy operated as a Transfer, or superseded the Necessity of Notice. The Proviso that the Trustees may forbear calling for the Transfer, is inserted merely as protective of them. Cases might be put, in which such a Provision, if inserted with a View of obtaining for the Object of the Trust, a Preference over Creditors, would be considered as a Fraud. The only Question is, whether this is a Covenant broken before Bankruptcy? I am sorry to say it is not.

1813, *Feb.* 5.

Ex parte DE TASTED.—In the Matter of LATHAM and PARRY.

The Proof of a Creditor, who claims to retain Property against, or has Interests inimical to the general Creditors, ought not to be rejected (for the Amount of his Debt beyond the Value of his Securities) on the Ground that he will be enabled by his Proof to elect himself Assignee. But if he should so elect himself, the Court will remove him; for which Purpose the Application ought to be without Delay. It is a general Rule in Bankruptcy, that an Assignee having adverse Interests will be removed, or an Arrangement made, by the Appointment of some other Creditor, for the Investigation of his Claims.

THE Proof of the Petitioner's Debt to the Amount of £85,000, had been rejected by the Commissioners, on the Ground of his Refusal to deliver up Wine

In this Case the adversely claiming Assignee being a Creditor to a great Amount, was suffered to remain, and a Creditor appointed to investigate and contest his Claims.

Difference between Bills of Exchange deposited as a Security, and Property of which the Value cannot be ascertained till a Sale. If the Creditor is willing to take the Bills of Exchange at their Amount, as they cannot produce more, the Estate cannot be damnified: and his Proof should be admitted for the Difference.

and

and Brandy of the Value of £40,000, and Bills of Exchange to the Amount of £25,000, which it was alleged he had, in Fraud of the other Creditors, obtained from the Bankrupt on the Eve of the Bankruptcy, and as a Consideration for compounding a Prosecution for Forgery. He was desirous of voting in the Choice of Assignees: his present Application was, that the Commissioners might be at Liberty to set a Value on the Property in his Possession, and admit him to prove the Residue of his Debt.

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Ex parte DE TASTED.—In the Matter of LATHAM and PARRY.

Sir *Samuel Romilly*, in support of the Petition *(a)*.

The Lord CHANCELLOR.

He must give Security to deliver up the Property, if the Commissioners should be of Opinion that he is not entitled to retain it, and he should not reverse their Adjudication by an Application here.

Ordered.

(*a*) Assignees had not been chosen, and no Person on Behalf of the Creditors had been served with the Petition.

Ex parte MARTELL.—In the Matter of LATHAM and PARRY.

1813, *Feb. 7.*

MR. *Leach*, this Day, on a Petition by the petitioning Creditor, moved to discharge that Order. He contended that the former Petition ought to have been served, either on the petitioning Creditor or the provisional Assignee: that the Property had been obtained improperly, on the Eve of Bankruptcy, to stifle a Prosecution for Forgery. That *De Tasted*'s Object in proving, at so early a Stage of

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Ex parte MARTELL.— In the Matter of LATHAM and PARRY.

the Proceedings, was from the Magnitude of his Debt to choose himself Assignee. That it was an invariable Rule with Commissioners, not to suffer a Person who had obtained Property of the Bankrupts on the Eve of Bankruptcy, and improperly, and who of course had Interests hostile to the rest of the Creditors to vote in the Choice of Assignees; that he could not sustain the general Interest of the Creditors, having an Interest diametrically opposite.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, in support of the Order, argued that the Commissioners, if they had made such a Rule as had been stated, had exceeded their Authority; that the Statutes considered the Majority of Debt, (which *De Tasted*'s was) as the Interest to be protected; not the Number of the Creditors.

The Lord CHANCELLOR

Observed, that with the Question, whether or not *De Tasted* had properly possessed himself of the Property, or would be able to retain it, he had then nothing to do; he directed, that the Order should be discharged; that the Choice of Assignees should be postponed; that *De Tasted* should, in the mean Time, be at Liberty to go before the Commissioners, and offer such Proof, as he should be advised, with Liberty to apply to the Court.

De Tasted went before the Commissioners, and tendered his Proof for £85,000; being the Difference between the Amount of his Debt, (including the Bills of Exchange,) and the Brandy and Wine in his Possession. The Commissioners refused to receive it, on the Ground that he would thereby be enabled to elect himself Assignee, and that, if so elected, the Court would remove him.

Sir

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Ex parte MARTELL.— In the Matter of LATHAM and PARRY. *Feb.* 8.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, this Day applied for an Order upon the Commissioners to receive the Proof: it is not denied, they said, that *De Tasted* is a Creditor; and the only Question is, whether a Creditor shall prove? The Commissioners have no Right to anticipate, that he will make an improper Use of his Proof; it is doubtful, whether the *Lord Chancellor* can deprive a Creditor of his legal Right upon such an Anticipation; and *a fortiori* the Commissioners cannot.

Mr. *Leach* and Mr. *Montagu*, *contra*, argued, that the Commissioners having properly exercised their Discretion, his Lordship would not interfere. To admit his Proof, is to say he shall be Assignee; but the Court will never suffer a Person to be Assignee who insists upon Interests inimical to the Creditors for whom he is appointed Trustee; at all Events the Bills of Exchange ought to be deducted from the Proof.

The Lord CHANCELLOR.

If I had been aware, that a Petition would have been presented by *De Tasted* so early as this Morning, I would have looked into the Cases: I will however state what occurs to me upon the Principle. I think it an extremely disputable Proposition, that a Creditor shall not be admitted to prove, because he may afterwards make an ill Use of his Proof. It is now too late to dispute the Jurisdiction of this Court, to remove an Assignee claiming adversely to the Rest of the Creditors: it is constantly exercised. The Court certainly modifies the Application of the Rule; as where a Length of Time has been suffered to elapse, before the Application for the Removal has been made; where Sales have been made, or Transactions of Importance have

taken

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Ex parte MARTELL.— In the Matter of LATHAM and PARRY.

taken place, which may be affected by removing him; the Court has in these and many similar Cases, so qualified the Rule by Arrangement, as to obviate the Mischief which might otherwise arise from the Removal of the Assignee. The Court, in a late Case, directed an Action at Law to be brought by an Assignee against his Co-assignee, who was not to set up his Title under the Assignment.

The first Question is, as to the Petitioner's having adverse Claims: the second is, as to the Bills of Exchange which he has in his Possession. As to his adverse Claims, it is sufficient to say, that I am not now to determine, whether, if he is chosen sole Assignee, or joint Assignee, either by the Amount of his own Debt, or by the other Creditors, I am to remove him. It is enough for me to say, that the Circumstances furnish Evidence of his having a strong adverse Interest; and that probably if he be elected sole Assignee, he will not be suffered to remain: but I cannot determine that now. I should not do Justice, if I were to take it for granted, that he will choose himself sole Assignee; should he do so, it should be brought before the Court without Delay; because, if so brought before the Court immediately, before any Thing of Importance has been done, it is of course that he should be removed. The Court under particular Circumstances has said, that a Creditor who is about to abuse his Right shall not be permitted to vote; but I do not know, before he has shewn such Inclination to abuse his Right, that the Court has ever interfered; it is too much to say you shall not prove, because perhaps you may vote for an improper Assignee; his adverse Claims are not a sufficient Objection against his Proof, although they may be against the Use of that Proof; but I will not anticipate Abuse.

As

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Ex parte MARTELL.—In the Matter of LATHAM and PARRY.

As to the Securities which he holds, it is quite clear, that where, for Part of his Debt, the Creditor has a Security, his Proof can only be received, for the Residue, after the Security has been valued; because the Security may possibly cover the whole Debt. That Rule does not apply to this Case; Bills of Exchange are not like an Estate of which no Estimate can infallibly be given. In the Case of Bills of Exchange, if the Creditor with whom they are deposited is willing to take them at their Value on the Face of them, the Estate cannot be damnified: they may produce less, but they cannot produce more. If a Creditor will therefore deduct from his Debt the Bills at their Amount, he is in the same Situation as any other Creditor. I shall say no more at present; if his Claims are seriously adverse, his Right of voting, as far as respects the choosing of himself Assignee, will be hopeless, and the Creditors may apply here immediately; with these Observations, I think the Proof should be admitted.

His Proof was admitted for £60,000.

De Tasted, and a Person of the Name of *Sautillo*, were chosen Assignees.

Feb. 12.

A Petition was immediately presented, and now came on for the Removal of *De Tasted*, and for another Choice. They had elected themselves. *Sautillo* was a Creditor to the Amount of £10,000. It was contended for *De Tasted*, that being a Creditor to so large an Amount, he ought not to be devested of his Office of Assignee, further than was necessary for the fair Investigation of his adverse Claims.

The

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Ex parte MARTELL.—In the Matter of LATHAM and PARRY.

The Lord CHANCELLOR.

This Petition seeks nothing against *Sautillo*; I can therefore make no Order against him. As to *De Tasted*, he is now a Creditor to the Amount of £60,000, and may be finally to a great Deal more. It cannot remain as it is; if by any Arrangement, I can give the Creditors the Benefit of fairly investigating and contesting his Claims without removing him, I should wish to do so.

Let One of these Petitioners be appointed a Co-assignee, to act solely in the Investigation of *De Tasted*'s Claims, and for that Purpose to bring Actions, and institute Suits: *De Tasted* not to set up his Title as Assignee. Let the Costs of this Application be paid out of the Estate; the rest of the Costs must depend on the Proceedings which may take place.

LINCOLN'S INN HALL. *Dec.* 1812.

Ex parte LAFFERT.—In the Matter of HARDENBERGH.

Certificate stayed, on the Ground that the Bankrupt having suffered a fictitious Debt to be proved, could not have made a full Discovery.

THIS was a Petition to expunge a Debt, which the Bankrupt had improperly permitted to be proved, and to stay the Certificate.

The Debt was directed to be expunged.

Mr. *Parker*, for the Bankrupt, pressed for the Allowance of the Certificate; observing, that the Debt which had been directed to be expunged, had not been the Means of turning it in his Favor.

The

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Ex parte LAFFERT.—In the Matter of HARDENBERGH.

The Lord CHANCELLOR.

But by permitting this Debt to be upon the Proceedings, he cannot possibly have made a full Discovery. I will not preclude him from any Explanation, if he is able to give any; but in the mean Time his Certificate must be stayed.

Hilary Term, 1813.

Ex parte KENNET.

The Court will not stay the Certificate upon a legal Objection, unless it clearly appear; as it would thereby preclude the Validity of it, from being ascertained by a Trial at Law

THIS was an Application to stay the Certificate, on the Ground, that the Bankrupt had lost at Cards, &c. in One Day £5, and £100 within Twelve Months previous to his Bankruptcy (*a*). The Affidavits as to the Fact were contradictory.

Mr. *Cullen*, in support of the Petition.

Sir *Samuel Romilly*, *contra*.

The Lord CHANCELLOR.

The Court is not in the Habit of granting Certificates, where, when granted, they will be void: this is a different Application, from One to the mere Discretion of the Court, where, if the Certificate is granted, it will be good. The Law has positively said, that a Bankrupt, who shall have lost at Play in any One Day the Sum of Five Pounds, or in the whole the Sum of One Hundred Pounds within Twelve Months preceding the Bankruptcy, shall have no Benefit under his Commission. This Court ought not, if there has been a clear Violation of that

(*a*) 5 *Geo.* II. c. 30. s. 12.

Law,

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Ex parte
KENNET.

Law, to grant the Certificate; but then it ought clearly to appear, that there has been a Violation; because, by refusing the Certificate, the Court withholds an Opportunity, of having it tried before a Jury; these Affidavits are most contradictory: I therefore grant this Certificate; and if you wish to impeach it, you may bring an Action, or indict for the Perjury.

I shall not give the Bankrupt his Costs (*a*).

(*a*) *Vide ex parte Stracey*, and the miscellaneous Points in the Note, *ante*, p. 67.

Michaelmas Term.
1812.

Upon an Application by a petitioning Creditor, for Liberty to proceed with a Commission, which had been kept unexecuted, pending an Arrangement for a Composition; or to supersede it, and take out another: the *Lord Chancellor* superseded the Commission without Prejudice to the Bankrupt's Action, and refused to order that the same petitioning Creditor should take out another.

Ex parte SMITH and OTHERS.—In the Matter of FORD.

ON the 30th of *April*, a Commission issued on the Debt of the Persons who presented the present Petition; but no Proceedings had taken place under it, on the Ground of an Offer having been made by the Bankrupt, to pay his Creditors Two Shillings and Sixpence in the Pound. That Offer of Composition not having been carried into Effect, the Creditors were desirous of going on with the Commission; but being advised, that after the Lapse of Time, it would be unsafe to proceed in it, without the Sanction of the *Lord Chancellor*, the present Application was made for Permission to proceed with the Commission, or to supersede it, with Liberty to take out another.

Mr. *Wingfield*, in support of the Petition.

The

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Ex parte SMITH and Others.—In the Matter of FORD.

The Lord CHANCELLOR.

I do not like to be made a Party to such a dealing with a Commission. It is not my Commission in Bankruptcy, but a Process taken out, for the Purpose of pressing the Bankrupt and his Friends to an Arrangement. Let the Commission be superseded, without Prejudice to an Action by the Bankrupt; and I will not give any Directions for the Petitioners to have another (*a*).

(*a*) In *ex parte Pulestun*, 2 *P. Wms.* 545. A Commission had been kept Six Months without doing any thing under it; it was then executed, and the Bankruptcy declared. Lord Chancellor *King*, on account of the Delay, superseded the Commission.

By General Order, 26th *June* 1793; a Town Commission is supersedeable for Want of Prosecution, at the End of Fourteen Days from the Date of it; and a Country Commission at the End of Twenty-eight. By another Order, 6th *December* 1788; a petitioning Creditor, who has neglected to prosecute one Commission, cannot sue out another, without the Favor of the Court.

LINCOLN'S INN HALL, 1812, *Dec.* 6.

Ex parte DUFRENE (*a*).

An Act of Bankruptcy subsequent to the striking of the Docket;

THIS was a Petition for a Supersedeas, impeaching the Validity of a Commission upon the following Objection. The Bankrupt was in Prison upon an Arrest for Debt; the Docket was struck before the Expiration

but previous to the sealing of the Commission, (and for that Purpose a Fraction of a Day is admitted), will sustain the Commission. Although a Commission is taken out on a concerted Act of Bankruptcy, it may be sustained by any Act that can be proved antecedent to the Commission.

It is discretionary in the *Lord Chancellor* to supersede a Commission; although itmay be unimpeachable on strictly legal Grounds.

(*a*) 1 *Vesey* and *Beames*, 51.

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of the Two Months; which however had expired before the issuing of the Commission.

Mr. *Cullen*, in support of the Petition, cited *Gordon* v. *Wilkinson*, 8 T. R. 507; and distinguished this from *Wydown's* Case, 14 *Ves.* 80 (*a*). The Statute 13 *Elizabeth*, c. 7. s. 2, speaks of a Commission issuing against a Person "being Bankrupt" and the Language of the Bond to the Great Seal is "become Bankrupt."

Sir *Samuel Romilly* and Mr. *Cooke*, *contra*, relied upon *Wydown's* Case as in Point, observing, that this, if any thing, was stronger than *Wydown's* Case: here being an inchoate Act of Bankruptcy; in that there was none. *Glassington* and *Rawlins*, 3 *East.* 407.

The Lord CHANCELLOR.

If a Commission is supported by an Act of Bankruptcy complete before the Commission is sealed, no Court of Law can deal with it otherwise than as a valid Commission. If the Act of Bankruptcy is complete on One Part of a Day, and the Commission is sealed on a subsequent Part of the Day, provided that the subsequent Sealing is established by Evidence, (however imprudent it may be in the Creditor not to delay the Sealing till another Day, unless there be pressing Reasons for not delaying it) the Commission is unobjectionable. At Law, therefore, it is quite enough, if there be a petitioning Creditor's Debt before the Bankruptcy, and the Species of an Act of Bankruptcy, committed before the Sealing: but it does

(*a*) In *Gordon* v. *Wilkinson*, the *Commission* issued before the Act was complete. In *Wydown's* Case, the Docket was struck; then the Act, by absconding was committed; and on the same Day the Commission was sealed:— held not supersedeable. The Act of Bankruptcy by lying in Prison, is complete at the End of Two *Lunar* Months. The Day of Arrest is included, unless where the Party has been bailed, and then the Day of the Surrender. The Act operates by relation from the first Day of the Two Months. *Vide* the Cases in the Text.

not

not follow that with all this Validity at Law, there may not be Reasons rendering it supersedeable, as a Matter of Discretion here.

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Ex parte
DUFRENE.

If Lord *Kenyon's* Observation (*a*) was to be understood, as applied to a Person, swearing that the Act of Bankruptcy, by lying Two Months in Prison was then complete; Perjury would be the right Denomination of the Offence, both legally and morally. But that is not the Species of Protection, under which the Law has placed the Bankrupt. Whether it should be so, is quite a different Consideration, but the Law does not require the Statement of a particular Act of Bankruptcy. Although a Person did not in Fact believe that the Object of this Process had, at the Time of the Affidavit, committed an Act to bring him within it; yet I fear I am bound by Law and Practice to declare, that the Commission would be good, if there were an Act antecedent to it. The Commissioners only inquire, as to an Act before the Commission: they have no Right to inquire farther. They are in that respect like a Court of Law.

Am I to conclude, that the Man had Reason to believe that no other Act of Bankruptcy had been committed but this? Although a Commission is taken out on a concerted Act of Bankruptcy, on the Oath of a Person who states his Belief of an Act having been committed, but who has no Knowledge of any Act but the concerted One: yet if Acts can be proved subsequently committed, and of which the Petitioner could possibly have had no Knowledge, it has been the constant Course in Law to sustain the Commission; and without an Instance of Application here to supersede it.

(*a*) That a Commission under these Circumstances was founded in Perjury. *Gordon.* v. *Williamson*, 8 T. R. 507.

To

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To entertain Petitions of this kind, on the fair Belief of the Creditor, as to Existence of an Act of Bankruptcy at the Time of his Affidavit, would be to open a Source of Petitions without ceasing. It is true the Affidavit may, according to the present Practice, be made as well on the first Day of the lying in Prison as on the last. It is true, Perjury may be the Consequence of this Practice. But I know of no Security for the Bankrupt under the Law, as it now stands, further than the Conscience of the Creditor, and the Terror of the Bond.

In the present Case, to grant a Supersedeas would not be to preclude the Bankruptcy; because a Commission might issue upon this Act of Bankruptcy. I do not however decide upon that Circumstance; I am still of Opinion, that the Decision in *ex parte Wydown* was right; but if, upon Review of the Cases, I think I am wrong, I will mention it again: otherwise, let this Petition be dismissed.

7th Dec. His Lordship this Day said, that upon Consideration, he thought the Decision in *ex parte Wydown* was right, and dismissed the Petition.

LINCOLN'S INN HALL. 1813, *March* 16.

S. C. more fully 1 V. & B. 350

Ex parte FLETCHER.

Publication of the Bankruptcy in the *Gazette* suspended upon an Affidavit of Solvency, and of not having committed any Act, &c.; but the Operation of the Commission in other Respects continued.

THIS Petition stated, that *Fletcher* had Two Years ago accepted a Bill of Exchange for the Accommodation of one *Stanton*; who informed him, that the

Bill

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Ex parte FLETCHER.

Bill when due, had been taken up. The Bill had however been lately presented for Payment; *Fletcher* refused to pay it; and a Docket was immediately struck against him at the Instance of *Stanton*. The Commission had issued; but it had not been opened. The Petition offered to pay the Amount of the Bill into Court, and prayed that the Publication of the Bankruptcy in the *Gazette* might be suspended till further Order.

There was an Affidavit by *Fletcher*, stating that he was solvent, and had committed no Act of Bankruptcy. And an Affidavit by another Person, stating that *Stanton* had admitted the Bill to have been accepted without Consideration; and that he had threatened to injure *Fletcher* by every Means in his Power.

Sir *Samuel Romilly* and Mr. *Wingfield*, in support of the Application.

The Lord CHANCELLOR

Made the Order to restrain the Publication of the Bankruptcy in the *Gazette* until further Order; and without otherwise interfering with the Progress of the Commission (*a*).

(*a*) *Vide ex parte Proston, ante*, p. 259, *ex parte Foster*, p. 49.

END OF THE THIRD PART.

CASES

IN

BANKRUPTCY, &c.

JONES and ANOTHER, Assignees of MINGAY and Co. Bankrupts, against DWYER and ANOTHER.

1812. *Saturday, Jan.* 25.

15 *East* Rep. 21. 28.

ON the 16th *December* 1809, *Cotteril*, being indebted to *Mingay* and Co. transferred to them by a Sale-note, in the joint Names of himself and *Wallace*,

The Stat. 21 *Jac.* 1. c. 19. s. 11. transfers to the Assignees of a Bankrupt such Goods as, by the Consent of the Owner, the Bankrupt has in his Possession at the Time of his Bankruptcy; therefore where the Purchaser of Goods lying at a Wharf in the Name of the Seller, received from him, at the Time of the Sale, an Order on the Wharfinger for the Delivery of the Goods, but suffered them to remain in the Name of the Seller for several Months after, during which Time the Seller disposed of a Part thereof; but, upon Notice of the Seller's Insolvency, the Purchaser carried the Order to the Wharfinger and had the Goods transferred into his own Name, and nine Days after that the Seller became Bankrupt; held, that the Assignees of the Bankrupts were not entitled to these Goods, for there was a complete Transfer of Possession before the Bankruptcy.

Qu. Whether the Statute would at any Rate have extended to Goods the joint Property of two Traders, but deposited at the Wharf in the Name of one only, who after such Sale in his own Name, became Bankrupt?

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JONES and Another, Assignees of MINGAY and Co. Bankrupts, against DWYER and Another.

a Quantity of Bacon then lying in the Name of *Cotteril* only, at Bridge-yard Wharf; and handed over to them an Order in his Name alone, upon the Wharfingers, for the Delivery. The Bacon continued however at the Wharf in the Name of *Cotteril*, until the 13th of *June* following, during which Time he disposed of several Lots of it, which were delivered by the Wharfinger to his Order. On that Day *Cotteril* stopped Payment; and *Mingay* and Co. in Consequence thereof, lodged with the Wharfinger the Order of Delivery given to them in *December*, and the Bacon was transferred by the Wharfinger into their Names. On the 22d of *June Cotteril* became a Bankrupt; and in the *July* following, a Commission of Bankrupt also issued against *Mingay* and Co. In *August* the Defendant sold the Bacon for and on Account of the Plaintiffs, but having received Notice from the Assignees of *Cotteril* to pay to them the Proceeds of such Sale, they withheld them from the Plaintiffs. A Verdict had been found for the Plaintiffs for £6844: 12*s.*: 6*d.*; and in the following Term a new Trial was moved for, on the Ground that *Mingay* and Co. having suffered *Cotteril* to have the Possession and Disposition of the Bacon up to the Time of his Insolvency, their taking Possession at that Time was fraudulent, as against the Creditors of *Cotteril*, who were therefore entitled to the Goods, under the Statute 21 *Jac.* I. c. 19, s. 11.

Lord ELLENBOROUGH.

The Question depends on the Statute of *James*, and that Question is whether the Goods can be said to have been in the Possession of *Cotteril*, as the true Owner, at the Time he became a Bankrupt. It seems to me that the Possession was as completely removed out of him as it could be. A complete Change of the Property took Place by the Transfer made in the Wharfinger's Books. If I were at Liberty to construe the plain Words of the Statute,

Statute, "at such Time as they shall become bankrupt," to mean before the Bankruptcy, I must here extend that Construction to nine or eleven Days before. Where then am I to stop? There is no Period of Time which may not be ingrafted on the Statute by such a Construction, if I may depart so far from the clear Language used in it. The Case of *Darby* v. *Smith* (*a*) has been much pressed upon us. That was a Case arising out of an Arbitration. The Arbitrator, in forming his Judgment, was of Opinion, that the Possession of the Trustees was colourable; and the Court, in upholding his Judgment, must, I think, be taken to have adopted the Opinion, that the Goods still remained in the Possession of the Bankrupt, in whose House they were up to the Time of his Bankruptcy; I cannot conceive that they meant to supersede the clear intelligible Words of the Statute. It would be highly dangerous by any Construction to vary the Period of Time fixed by the Statute. With respect to the joint Ownership of *Wallace;* if it be in the usual Course of Trade to deposit joint Property in the Name of one only, the Argument may be good: if not usual, I should think the Property would pass; but that Usage, perhaps, is a Question of Trade for the Decision of a Jury.

Grose, J. Le Blanc, J. Bayley, J. concurred.

Rule for a new Trial discharged.

(*a*) 8 *Term* Rep. 82. 6 *Ves. Jun.* 488.

LEE and ANOTHER, Assignees of HILL, a Bankrupt, against LOPEZ, Bart.

1812.
Feb. 10.

15 *East* Rep. 230, 233.

A Tenant having committed an Act of Bankruptcy in *October* 1810, upon which a Commission issued on the 21st of *January* 1811, and the Sheriff having on the 7th of *January* levied an Execution, under which he sold the Goods of the Tenant, on the 21st and 22d of *January*, for £520, and out of that Sum paid the Landlord £140 for one Year's Rent in Arrear: held in an Action for Money had and received, brought by the Assignees of the Bankrupt Tenant against the Sheriff, to recover the whole Amount of the Sum levied, that the Property in the Goods being changed by the Act of Bankruptcy and Commission, and transferred to the Assignees, it lay upon the Sheriff to prove that he had paid over the Money to the Landlord and execution Creditor, before he had Notice of the Commission issued: and not giving such Proof that he was liable for the Amount to the Assignees, and that he was not entitled to deduct the £140 paid over to the Landlord, as for the Year's Rent in Arrear under the Stat. 8th *Ann.* c. 14. s. 1. A Commission of Bankrupt not being an Execution within the Meaning of that Statute, which directs, that no Goods upon demised Premises shall be taken by Virtue of any Execution, unless the execution Creditor shall, before the Removal of such Goods from off the Premises, pay to the Landlord all Arrears of Rent not exceeding a Year's Rent.

THIS was an Action brought against the Sheriff of *Devon*, for Money had and received to the Use of the Plaintiffs, which was tried before *Graham*, *B.* at the last Assizes at *Exeter*. The Act of Bankruptcy was on the 17th of *October* 1810, the Commission issued on the 21st of *January* 1811. On the 7th of *January* the Sheriff levied (*a*), and on the 21st and 22d the Goods were sold, and the Proceeds, amounting to £520: 11*s.*: 8*d.* paid to the under Sheriff, who afterwards paid to *Edwards* the Landlord £140 for one Year's Rent to *Midsummer* preceding. The Sheriff claimed this Sum as a Deduction;

(*a*) The Writ was returned on the 23d of *January*.

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LEE and Another, Assignees of HILL, a Bankrupt, against LOPEZ, Bart.

Deduction; and *Graham, B.* at the Trial, inclining to think that a Commission of Bankrupt might be deemed an Execution within the equitable Construction of the Stat. 8 *Ann.* c. 14. so as to entitle the Sheriff to this Deduction, a Verdict was thereupon taken for the Plaintiffs for the Sum levied, after deducting the Rent paid; with Liberty for the Plaintiffs to move the Court to add £140 to the Damages, if the Court should think that the Year's Rent to the Landlord was unduly paid. A Rule *Nisi* for that Purpose was accordingly obtained by *Horner* in the last Term; when *Lord Ellenborough, C. J.* said, that a Commission of Bankrupt had been sometimes called a statutable Execution: but though it might be said to be similitudinary to an Execution, it was not an Execution; it operates as an Execution, but, strictly speaking, Execution is only on a Judgment.

The learned Judge's Note having omitted to state the Date of the Payment by the Sheriff to the Landlord, whether it was before Notice of the Commission; the Counsel not being able to supply that Fact from their Notes of the Evidence; the Court then said, that it lay upon the Defendant to shew that the Payment was made before Notice of the Commission, and ordered that the £140 should be added to the Verdict, unless it could be shewn by Reference to the learned Judge's Note that such was the Fact.

ANTRAM *v.* CHACE.

15 *East* Rep. 209. 212.

IN this Case, the petitioning Creditor's Debt was to be proved by a Deed of Reference, between himself, the Bankrupt, and others their Partners, of all Accounts between them, or any two of them, and by an Award of a separate Debt of above £100, due from the Bankrupt to the petitioning Creditor.—Held, that it was not sufficient, to prove the Execution of the Deed by the petitioning Creditor and the Bankrupt, without proving also the Execution by the other Partners, by whom it appeared on the Face of it to have been also executed. For the Consideration of each to execute his own Submission, was the Submission of all the others, and without Proof of that, the Arbitrators had no Authority to make their Award between any of the Parties.

1812.
Wednesday,
Feb. 12.

PHILLIPS *v.* DICAS, one, &c.

15 *East* Rep. 248. 253.

THIS was an Action on a Bill of Exchange. The Defendant pleaded the general Issue, his Bankruptcy and Certificate, and a Set-off for Law Charges.

The Plaintiff got rid of the Certificate, by Evidence of a Promise of the Bankrupt to pay, and a subsequent Payment by him, of the whole Debt of a particular Creditor, on Condition of his signing it (*a*). The Defendant then, under the Plea of Set-off, put in a Bill of Costs amounting to £117 : 7*s.* : 5*d.* for Business done for the Plaintiff, as petitioning Creditor under a Commission of Bankrupt. In answer to this the Plaintiff produced a Receipt in the Hand-writing of the Defendant. "Received from the Assignees of S. W. £100 on Account of

The fourth of several Signatures to a Certificate having been obtained by the Promise of the Bankrupt to pay that Creditor his Debt, such Certificate is void by Stat. 5 *Geo.* II. c. 30. s. 7. 11. though the Creditors who signed before and after the fourth were sufficient in Number and Value, without that one; for his Example might have induced the others to sign.

The Attorney employed by the petitioning Creditor before the Choice of Assignees, and continued by the Assignees afterwards, having delivered his Bill to them, including all Charges incurred by Order of the petitioning Creditor, and having received a certain Sum from the Assignees on Account of his Bill generally, is bound, as they themselves were by the 25th Sect. of the Act, to appropriate the Sum so received, in Reduction of the Charges incurred by Order of the petitioning Creditor, and for which he was originally responsible: and the Amount of such Charges covered by the Sum so received, cannot be set off by the Attorney, against a Debt due from him to the petitioning Creditor on his own Account.

(*a*) 5 *Geo.* II. c. 30. s. 7. 14.

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PHILLIPS v. DICAS, one, &c.

my Bill, *J. Dicas* (*a*)." The Defendant's Counsel contended, that the Defendant not having received the £100 specifically on Account of the petitioning Creditor's Bill, had a Right (on the Principle that a Person having two Demands may apply Money received generally, to either), to apply it in Payment of his Bill for Business done for the Assignees after they had been chosen. To this it was answered and ruled by the Court, that the Stat. 5 *Geo.* II. made the Appropriation, by directing the Assignees to pay the Costs of the petitioning Creditor, out of the first Monies received: and nothing appearing to negative the Application which the Law directed, it must be taken to be a Payment according to Law, and the Defendant as Solicitor to the Assignees bound so to apply it. A Verdict was therefore taken for the Plaintiff, with Liberty to move to enter a Nonsuit. *Gleed* moved in the last Term to enter a Nonsuit, or for a new Trial. 1st. As to the Evidence given to impeach the Certificate, he contended that it was met by counter Evidence, that there were sufficient Creditors in Number and Value, exclusive of the objectionable Creditor, to give the Certificate, therefore his Subscription was immaterial, and not within *Robson* v. *Calze* (*b*), or *Holland* v. *Palmer* (*c*). Upon the other Point, he contended that the Effect of the Stat. 5 *Geo.* II. c. 30. sec. 25. was not to discharge the Plaintiff from his Liability to the Defendant, but merely to entitle him to Reimbursement from the Assignees.

The COURT,

As to the first Point, asked in what Order the Signa-

(*a*) The Bill delivered by the Defendant to the Assignees, amounted to £194: 18*s.*: 10*d.* including all the Items charged in the petitioning Creditor's Bill of £117: 17*s.*: 5*d.* and also Charges for Business done for the Assignees.

(*b*) *Doug.* 227.

(*c*) *Bos. and Pul.* 95.

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1812.

PHILLIPS v. DICAS, one, &c.

tures were affixed to the Certificate; and being answered that the objectionable Signature stood the fourth, and that the three first Signatures were not sufficient in Number and Value, said that the Creditors who subsequently signed the Certificate might have been induced so to do by the Signature of the fourth. *Holland* v. *Palmer* was decided upon that Ground, and not that the Signature improperly obtained was necessary to make up the Number and Value: as to the second Point, when the Defendant received the £100 from the Assignees as their Agent and Attorney, on Account of his Bill delivered to them, which included all the Expenses incurred by the petitioning Creditor, he was bound to appropriate it as *they* were bound to do.

NORTON *v.* SHAKESPEARE.

15 *East* Rep. 619. 622.

1812. *May* 9th.

Lord ELLENBOROUGH, *C. J.* (*a*) this Day delivered the Judgment of the Court.

A Deed of Composition framed only for *the joint Creditors* of two Bankrupts, and which was not signed or accepted by the separate Creditors of one of the Bankrupts, is not such a compounding with Creditors, as will, within the Stat. 5 *Geo.* II. c. 30. s. 9. limit the Effect of the Certificate to the Protection of the Person only, and not of the future Property of the Bankrupt.

THIS Case came before the Court upon a Motion for a new Trial; and the Question was, whether *Norton* the Plaintiff had made such a Composition with his Creditors, as under the Stat. 5 *Geo.* II. c. 30. s. 9. limited the Effect of a Certificate he had obtained under a Commission of Bankrupt issued against him, so as to leave his future Estate and Effects liable to his Creditors.

(*a*) The material Facts of the Case, as well as the Arguments relied on, are noticed in the Judgment of the Court.

The

1812.

NORTON v. SHAKESPEARE.

The Facts of the Case were shortly these—the Plaintiff and *Wolfe Lyon* were in Partnership together, and their Affairs being embarrassed, they called a Meeting of their Creditors, and offered a Composition of 3*s.* in the Pound, which several of their Creditors agreed to accept. A Release was accordingly prepared, by which the Persons who signed it being Creditors of *Norton* and *Wolfe Lyon* jointly, in Consideration of 3*s.* in the Pound being paid to them severally and respectively at the Time of sealing the Release, in full Satisfaction and Discharge of their several and respective Debts, released the Plaintiff and *Wolfe Lyon* from all their Claims and Demands. This Release was framed for the joint Creditors only, not for any separate ones, beginning thus: "We whose Names are hereunto subscribed, &c. Creditors of *Aaron* and *Wolfe Lyon*." It was signed by seven of the joint Creditors, whose Debts exceeded £2000, but there were three joint Creditors, whose Debts were £92, who did not sign; and though the Plaintiff had several separate Creditors, particularly the Defendant, and *Hill, Walton*, and Co. the Deed was not signed by them, nor was it so framed as to admit of their Signatures. And the Question is, whether this Release constitutes such a Composition as is within the Stat. 5 *Geo.* II. c. 30. s. 9. By that Clause, if any Commission shall issue against any Person or Persons, who, after the 24th of *June* 1732, shall have been discharged by that Act, or shall have compounded with his, her, or their Creditors, or delivered to them his, her, or their Estate or Effects, and been released by them, or been discharged by any Act for the Relief of insolvent Debtors after the Time aforesaid; the Body and Bodies only of such Person and Persons conforming to the Act, &c. shall be free from Arrest and Imprisonment; but the future Estate and Effects shall remain liable. And we think the true Construction of this Clause is, that the Compositions it contemplates are not such as are limited, and

and extend to a particular Description of Creditors only, but to such as are general, and would admit all Creditors of whatever Description they may be. A Discharge under the Stat. 5 *Geo.* II. by Bankruptcy and Certificate (in unexcepted Cases) is a general Discharge, releasing the Party from all Debts, joint as well as several, and several as well as joint. A Discharge under an Insolvent Act applies to all Debts. And it seems to us, that in the two other Cases mentioned in this Clause, of compounding with Creditors, and delivering up the Estate and Effects for them, such a Composition or Delivery only is contemplated as is general, and calculated to admit all Creditors of every Description. As the Composition therefore in this Case was limited and confined to the joint Creditors only, we are of Opinion that it does not take away from the Plaintiff the Certificate he has since obtained; that the Verdict, therefore, which was for the Defendant, was wrong, and that there ought to be a new Trial.

KINNEAR

1812.
Saturday,
May 9.

KINNEAR *v.* TARRANT and ANOTHER.

15 *East* Rep. 622. 634.

To *Scire Facias* against Bail upon their Recognizance, it is competent to the Defendants to plead in Bar against the issuing of Execution, that before the issuing of the *alias* Writ of *Scire Facias* the Plaintiff became bankrupt, and a Commission issued against him; on which he was declared a Bankrupt, before the Return of the Writ, and his Effects, Debts, &c. assigned to the provisional Assignee, who, before Plea pleaded, assigned to the Assignee under the Commission, who was entitled to sue the Defendants.

THE Plaintiff declared in *Scire Facias* against the Defendants, upon their Recognizance as Bail. The Defendants pleaded, that before the issuing of the *alias* Writ of *Scire Facias*, viz. on the 28th of *May*, 1810 (*a*), the Plaintiff became bankrupt, and a Commission issued against him; and before the said *alias* Writ was returnable, to wit, on the 31st of *May*, 1810, was declared a Bankrupt; and that on the same Day and Year, all his Estate and Effects were assigned to a provisional Assignee; and that after the Return of the *alias* Writ of *Scire Facias*, and since the Plaintiff so declared, but before the filing of the Plea, the provisional Assignee assigned over to the elected Assignees, whereby they became entitled to sue, &c.; and prayed Judgment, if the Plaintiff ought to have Execution. Replication, that after the Bankruptcy and Assignments in the Plea mentioned, the Proceedings were continued in the Name of the Plaintiff, for the Use and Benefit of his Creditors under the Commission and general Demurrers.

Marryat, in support of the Demurrers, stated, that in no Case where the Defendant has had the Means of pleading the Plaintiff's Bankruptcy in Bar, had the Court refused to give Effect to his Defence; though upon sum-

(*a*) The first *Scire Facias* was tested the 9th of *May*.

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mary Application, when he has come to ask a Favour of the Court, they may have imposed Terms upon him; and have permitted the Assignees to go on with the Action in the Bankrupt's Name, on giving Security for Costs, and relied on the Stat. 1 *Jac.* I. c. 15. s. 13.

Littledale, contra, argued, that the Plea, if admissible at all, ought to have been in Abatement, and not in Bar; but contended, that the Bankruptcy of the Plaintiff was no Abatement of a Suit once well commenced: and referred generally to *Austen* v. *Waugh* (*a*), *Bibbins* v. *Mantel* (*b*), *Hewitt* v. *Mantel* (*c*), *Webb* v. *Fox* (*d*), *Kitchen* v. *Bartsch* (*e*), *Kretchman* v. *Beyer* (*f*).

Lord ELLENBOROUGH, *C. J.*

Now delivered the Judgment of the Court. (After stating the Pleadings.) No Case has been cited where the Defendant, having a Day in Court to plead it, has been prevented from pleading the Bankruptcy of the Plaintiff and the Assignment of his Effects, in Bar to his Recovery, or his having Execution. All the Cases referred to are where a summary Application has been made to the Court for its Interposition; and there is no Case where the Question has arisen on the Record by Plea pleaded. But in *Hewitt* and others, Assignees of *Bibbins* v. *Mantel*, 2 *Wilson*, 375. where, after interlocutory Judgment obtained, the Plaintiff had become bankrupt, and had afterwards proceeded to final Judgment; on which Judgment the Assignees had brought *Scire Facias* to have Execution; and the Defendant pleaded the whole Matter in Bar, and prayed Judgment if the Assignees

(*a*) 3 T. R. 437.
(*b*) 2 *Wils.* 358.
(*c*) 2 *Wils.* 372.
(*d*) 7 T. R. 391.
(*e*) 7 *East* R. 53.
(*f*) 1 T. R. 463.

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KINNEAR
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ought to have Execution against him for the Damages; to which Plea the Assignees demurred; and the Court gave Judgment for the Assignees and against the Plea. In giving Judgment, Lord Chief Justice *Wilmot* says: "indeed if the Bankrupts themselves had brought a *Scire* "*Facias*, this Plea might have been good; because after "they became Bankrupts, perhaps they could have no "legal Right to have Execution." And Lord *Mansfield* expresses his Opinion more decidedly, in a Case which came before this Court in *Michaelmas* Term, 1782, and which is not in Print. That was, *Barnes*, Assignee of *Saunders*, a Bankrupt, v. *Maton*. "Mr. *Mansfield* shewed "Cause against a Rule for discharging a Defendant on "common Bail, in an Action brought by the Assignees of "a Bankrupt, on the Ground that he had been before ar- "rested by the Bankrupt before his Bankruptcy, for the "same Cause of Action, and had been since arrested afresh "by the Assignees in the present Action. The Suit "brought by the Bankrupt before his Bankruptcy had pro- "ceeded no further than the Delivery of a Declaration; "and he cited 2 *Wilson*, 358, *Bibbins* and others v. *Mantel*. "Mr. *Bearcroft*, *contra*, in Support of the Rule, cited "*Mayhoe* v. *Gregory*, *Trin.* 1777, as exactly in Point. "He said, It is enough for me to shew that the Assignees "may proceed in the first Action if they please: for if the "first may go on, the second is vexatious, and the Defend- "ant ought to be discharged. The Case in *Wilson* was "after a Judgment obtained by the Bankrupt. What "hinders the Assignees going on with the Action in the "Name of the Bankrupt? Why, the Defendant may "plead the Bankruptcy; but the Court will not allow such "Plea, if the Assignees come in and say, pay the Money "to us, and not to the Bankrupt.—Lord *Mansfield*. "The right Ground is, that the second Action is not vex- "atious, if the Assignees could not proceed in the first Ac-

"tion

" tion brought by the Bankrupt. The Defendant might " have pleaded the Bankruptcy, and the Court could not " have set aside a legal Bar." And as the same Plea has been pleaded in the present Case, which the Court of *K. B.* in the Case of *Barnes*, Assignee, *v. Maton*, just cited, recognized as a legal Bar, we cannot deny the same Effect to these Pleas in the present Instance; and must therefore pronounce, that the Plaintiff, the Bankrupt, cannot, under the Circumstances stated in these Pleas, have Execution against the Bail upon their Recognizance.

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CLARKE *v.* HOPPE and WONTNER, Bail of WILSON.

1810.
January 28.

3 *Taunt.* 46. 49.

THE Defendants became Bail for *Wilson* in *Michaelmas* Term, 1808. A Commission of Bankrupt issued against him, under which, on the 20th of *January*, 1809, he obtained his Certificate; not having then pleaded. In *June*, 1809, the Plaintiff signed an interlocutory Judgment for Want of a Plea; had since executed a Writ of Inquiry, signed final Judgment, sued out Writs of Execution, and proceeded regularly against the Bail.

The Defendant becomes bankrupt, obtains his Certificate, but omits to plead it. His Bail become fixed. The Court will not set aside the Proceedings.

The Question before the Court, (upon a Rule *nisi* and Cause shewn against it) was, whether the Proceedings against the Bail ought to be set aside.

The COURT

Permitted the Bail to try the Right of the Plaintiff in the original Action, upon an Issue; they, as Defendants, undertaking

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undertaking not to set up the Bankruptcy and Certificate as a Bar; the Bail Piece, in the mean Time, to stand as a Security; the Consideration of Costs to be reserved till after the Trial of the Issue; and the Rule, in the mean Time, to stand enlarged.

1811.
Nov. 15.

MORGAN and OTHERS, Assignees of HUNT, a Bankrupt, *v.* HORSEMAN and OTHERS.

3 *Taunton* Reports, 241. 246.

A Deed whereby a Debtor, under the Pressure of an hostile Creditor, conveys real Estates in Trust to sell and pay that Creditor, with a further Trust to pay Debts to certain Relatives, in order to give them an undue Preference, is an Act of Bankruptcy.

THE *Lord* CHANCELLOR directed the following Case for the Opinion of the Court of *Common Pleas.*

By Deed executed on the 4th of *July* 1797, made between the Bankrupt of the one Part, and the Defendants of the other Part; reciting, that the Bankrupt being indebted to the Defendants, Bankers at *Stratford-upon-Avon*, and to divers other Persons, in different Sums of Money upon Mortgage; and being also indebted to the Defendants in £6000 and upwards, for Bills, Drafts, or Promissory Notes in their Possession unpaid; and being also indebted unto his Mother and his Sister in £1000 for Money lent, had proposed to the Defendants, in Consideration of the Money due to them, and of their delivering up to him the said Bills, Drafts, and Notes, to the Amount of the said Sum of £6000; and also in Consideration of the Name of *Thomas Hunt*, who was the Brother of the said Bankrupt, being erased from the Bills or Notes then in the Possession of the Defendants; to convey and assure unto the Defendants and their Heirs, certain Manor Lands, and Hereditaments, &c. upon Trust,

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MORGAN and Others, Assignees of HUNT, a Bankrupt, *v.* HORSEMAN and Others.

Trust, that the Defendants, or the Survivors or Survivor of them or his Heirs, should sell and dispose of the same, and should, until such Sale, receive and take the Rents thereof; and out of the Monies to arise by such Sale, and by the Rents and Profits, should pay off and discharge the several Sums of Money due and owing from the said Bankrupt to the several Persons therein mentioned; and that after Payment thereof, the Defendants should retain to themselves out of the Purchase-money, a Sum of £10,000, and Interest due to them upon Mortgage; and also the Sum of £6000, due to them for Principal and Interest upon the Bills, Drafts, and promissory Notes in their Custody; and likewise pay the Sum of £1000 to his Mother and his Sister; and that they should deliver up to him, the said Bankrupt, the Bills, Drafts, or promissory Notes so erased as aforesaid; and after Payment of, and retaining the respective Sums of Money in the said Indenture mentioned, should pay the Residue of such trust Monies unto the said Bankrupt, his Heirs, Executors, Administrators, and Assigns.

The Provision in the Deed in Favor of *Horseman* and *Battersbee* was made fairly, in Consequence of their Pressure, and from Fear of hostile Measures being pursued by them. But the other Provisions in Favor of the Mother, the Sister, and the Brother, were voluntary and fraudulent, and to give them a Preference in Contemplation of Bankruptcy.

Vaughan, Serjeant, for the Plaintiff, contended, that this Deed was an Act of Bankruptcy, within 1 *Jac.* 1. *c.* 15. *s.* 2. *Linton* v. *Bartlett*, 3 *Wilson*, 47. *and Rust* v. *Cooper*, *Cowp.* 633.

Rough, Serjeant, *contra*, relied upon a Distinction in this Case, viz. that the first Provision in the Deed in

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MORGAN and Others, Assignees of HUNT, a Bankrupt, *v.* HORSEMAN and Others.

Favor of *Horseman* and *Battersbee* was not fraudulent: and he cited those Cases, in which a Deed containing Provisions void by Statute, has been sustained as to other Parts of it not open to the same Objection. *Kerrison* v. *Cole*, 8 *East*, 231. *Mowys* v. *Leake*, 8 *T. R.* 411.

MANSFIELD, *C. J.*

The Question put to us is, whether this is an Act of Bankruptcy. A Conveyance either of all or Part of a Man's Property, in Favor of fewer than all the Creditors, is an Act of Bankruptcy: because it is the Means whereby the Creditors may be defeated or delayed. It is impossible to say this is not an Act of Bankruptcy.

The Court certified to that Effect.

1812. *Tuesday, May 26.*

HEANNY and ANOTHER, Assignees, &c. *v.* BIRCH and ANOTHER, Sheriffs of *London*.

3 *Camp.* Nisi Prius Cases, 233. 235.

A Fisherman buying Fish of other Boats at Sea, and selling it ashore, is a Trader within the Bankrupt Laws; and if such be the usual Practice of a particular Class of Fishermen, one of them who is proved to have done so once, will be presumed to have continued to carry on his Business in the same Manner till the Time of his Bankruptcy.

TROVER for a fishing Smack, taken in Execution after an Act of Bankruptcy.

The Bankrupt carried on the Business of a Fisherman, from the Port of *Barking*, in *Essex*. Persons in this Line, during the Turbot Season, which lasts about three or four Months in the Summer, sail over to the Coast of *Holland* for the Purpose of Fishing. One Boat rarely catches

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HEANNY and Another, Assignees, &c. v. BIRCH and Another, Sheriffs of *London*.

catches a sufficient Cargo to be carried to *London* in so short a Time, that the Fish can be kept in good Condition. They are therefore in the Habit of buying Fish from one another at Sea, which they resell at *Billingsgate*. In the Winter, they go to the North Sea to catch Cod, and usually buy from each other in the same Manner. During one Turbot Season, some Years ago, the Bankrupt bought Fish on the Dutch Coast to fill up his Cargo, which he resold in *London*. But there was no Evidence of his having bought Fish at any subsequent Time. He continued, however, to go to Sea till his Bankruptcy.

Marryat, for the Defendant, contended that this was not a substantive Trading, but merely incidental to the Business of a Fisherman; and, 2dly, admitting it to be a Trading, he had ceased to trade before *September*, 1811, when the petitioning Creditor's Debt accrued.

Lord ELLENBOROUGH

Ruled the Trading to be sufficient; and that the Bankrupt, having been proved so to have bought and sold Fish one Season, must be presumed so to have continued his Trading down to the Bankruptcy (*a*).

(*a*) *Vide ex parte Paterson, post.*

1812.
Friday,
July 3.

SIMMONDS *v.* KNIGHT and ANOTHER.

3 *Camp.* Nisi Prius Cases, 251, 252.

In an Action by a Bankrupt against his Assignees, although they are not named as such on the Record, Notice must be given under 49 *Geo.* III. c. 121. s. 10. or the Commission and Proceedings will be sufficient Evidence of the Trading, Act of Bankruptcy, and petitioning Creditor's Debt.

TROVER by a Bankrupt against his Assignees. No Notice having been given under 49 *Geo.* III. c. 121. s. 10. the Defendants put in the Commission and the Proceedings.

For the Plaintiff it was insisted, that the Commission must be sustained by strict Evidence of the Requisites to support it; because the Defendants were not here described as Assignees, and they must have known that the Object of the Action was to dispute the Commission.

Lord ELLENBOROUGH.

I am bound to receive the Commission, and the Proceedings under it, as Evidence of the Trading, the petitioning Creditor's Debt, and Act of Bankruptcy. The Statute is not confined to Cases where the Assignees are named as such upon the Record; and must apply where the opposite Party knows they make out their Title under the Commission.

1812.
Saturday, Nov. 21.

PIRIE and ANOTHER, Assignees, &c. *v.* MENNETT.

3 *Camp.* N. P. Cases, 279. 281.

In an Action by the Assignees of a Bankrupt, it is not sufficient Proof of a Set-off, that the Commissioners permitted the Defendant to prove the Debt, proposed to be set-off, under the Commission.

THIS was an Action to recover £123 : 5*s.* for Premiums due upon certain Policies of Insurance, effected by the Defendant, an Insurance Broker, and underwritten by the Bankrupt.

The Defence was, that Losses to the Amount of £285 had happened before the Bankruptcy upon these Policies; that the Defendant had a *del credere* Commission, and therefore a Right to set-off the Losses.

The Evidence tendered to prove the Set-off, was, that the Commissioners had permitted the Defendant to prove the Amount of the Losses against the Bankrupt's Estate. And it was contended, that this was sufficient under 5 *Geo.* II. c. 30. s. 28 (*a*).

Lord ELLENBOROUGH.

I cannot receive the Proof of the Debt as Evidence of the Losses. The Commissioners can neither be considered as having done a binding judicial Act, nor as having represented the Assignees, and thus assented to the Defendant's Demand. If it can be shewn that the Assignees acknowledged that the Proof was just, it would then be sufficient Evidence against them (*b*).

(*a*) Directing the Commissioners to set-off one Debt against another, in Cases of mutual Credit.

(*b*) *Vide ex parte Mennett, post.*

STEVENS

Wednesday, July 8.

STEVENS *v.* ELIZÉE.

Camp. Nisi Prius Cases, 256, 257.

If a Commission issues against a Man by a wrong Name, under which he obtains his Certificate, a Plea of Bankruptcy to an Action brought against him by his right Name will be supported by Production of the Certificate, and Proof that he is the Person against whom the Commission issued.

ACTION on a Bill of Exchange; Plea Bankruptcy. The Defendant put in a Certificate, under a Commission issued against him by the Name of *Vincent Tallachon*. He was a French Emigrant, and he had gone in this Country by the Name of *Pere Elizèe*; but *Vincent Tallachon* was stated to be his true Name.

Garrow, for the Plaintiff, insisted that the Certificate was a Nullity.

Lord ELLENBOROUGH.

The Objection may be a good Ground for applying to the Lord *Chancellor* to supersede the Commission; but if it really did issue against the Defendant, while it remains in Force, I must give Effect to the Certificate. I shall require Evidence, however, that he was once called *Vincent Tallachon*, and of his Identity.

Wednesday, Dec. 2.

CURRIE *v.* CHILD, PRITCHARD, and BROWN.

Camp. Nisi Prius Cases, 283.

Where one Defendant pleads his Bankruptcy, and another the general Issue, the former cannot, on Proof of his Certificate, be made a Witness for the latter.

ACTION against the Defendants as Makers of a promissory Note. *Child* pleaded his Bankruptcy, and the others the general Issue. The Note being proved,

Jervis

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CURRIE v. CHILD, PRITCHARD, and BROWN.

Jervis, for the Defendants, put in *Child*'s Certificate; and proposed that a Verdict in his Favor should be recorded, and that he then should be called as a Witness for the others.

Lord ELLENBOROUGH

Refused to permit this Course to be pursued: and the Jury found a Verdict for *Child*, and against the others, at the same Time.

1812.
Friday, *Dec.* 18.

WATKYNS and ANOTHER, Assignees, &c. *v.* MAUND.

Camp. Nisi Prius Cases, 308. 310.

If a Commission of Bankrupt has passed the Great Seal, although it never be opened or acted upon, it has issued within the Meaning of 49 *Geo.* III. c. 121. s. 2. so as to be Notice of a prior Act of Bankruptcy.

THIS was an Action to recover £624, paid by the Bankrupt to the Defendant after an Act of Bankruptcy. The Defence was, that the Payment had been made more than two calendar Months before the Date of the Commission (*a*). To rebut this, the Plaintiffs put in two Commissions, which had issued against the Bankrupt prior to the Payment and the Act of Bankruptcy, and which had been *superseded without being opened.*

It was contended for the Defendant, that this was not the issuing of a Commission creating Notice within 49 *Geo.* III. c. 121. s. 2.

Lord ELLENBOROUGH.

I must consider that a Commission has issued, when it is delivered out under the Great Seal; and the Act expressly

(*a*) 46 *Geo.* III. c. 135. s. 1.

1812.

WATKYNS and Another, Assignees, &c. v. MAUND.

pressly says, the issuing of a Commission shall be deemed Notice of an Act of Bankruptcy, proved to have been committed at the Time of issuing such Commission (*a*).

(*a*) Notice of Insolvency, within the Meaning of the Statute 49 *Geo.* III. c. 121. means Notice of general Inability on the Part of the Bankrupt to meet his Engagements; not an occasional Pressure, such as his being obliged to renew his Bills. 1 *Camp.* 492.

1812. *Wednesday, Dec.* 23.

WILLIAM SPENCER *v.* BILLING.

Camp. Nisi Prius Cases, 310. 312.

Two Partners, one residing in *Manchester*, the other in *London*, the *London* Partner being for a few Days on a Visit at *Manchester*, both of them left the House of Business there, to avoid an Arrest, carrying their Books of Account with them. Held that they both thereby committed an Act of Bankruptcy.

THIS was an Action of Trespass, impeaching the Commission upon an Objection to the following Act of Bankruptcy.

The Plaintiff and his Brother *James* were Partners; the Plaintiff resided and carried on Business in *London*, under the Firm of *Spencer* and Co.; *James* resided and carried on Business at *Manchester*, under the Firm of *James Spencer* and Co. The Plaintiff having been travelling on Business in the North of *England*, went to *Manchester* in *September*, and for two Days stayed at his Brother's Lodgings, and occasionally visited the Counting-house in which his Brother carried on Business. At the End of that Time, both Brothers, being afraid of being arrested, set off privately in a Post-chaise to *Halifax* in *Yorkshire*, and carried all the Books of *James Spencer* and Co. with them.

Lord

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WILLIAM SPENCER v. BILLING.

Lord ELLENBOROUGH.

The Counting-house at *Manchester* must be considered the Counting-house of *William* as much as of *James*. The going to *Halifax*, in the Manner described, was an Act of Bankruptcy in both.

Robertson v. *Liddel*, 9 *East*, 487. *Ex parte Osborne*, *post*, *N.*

WHEELER *v.* BRAMAH and ANOTHER, Assignees of BORMAN.

1813. *Saturday*, *Feb.* 20.

Camp. Nisi Prius Cases, 340. 342.

COVENANT for Rent (*a*). *Borman* was declared Bankrupt on the 26th of *June*, 1810; on the 21st of *May*, 1811, the Bankrupt's Effects still remaining on the Premises, the Plaintiff threatened to distrain for three Quarters' Rent, then due. To prevent the Distress, one upon the Premises occupied by him nearly a Twelvemonth after the Bankruptcy, for the Purpose of preventing a Distress, paid the Arrears of Rent due, at the same Time intimating to the Landlord, that they did not mean to take the Lease, unless it could be advantageously disposed of. Afterwards the Lease was put up to Sale by the Assignees, but there was no Bidder. They omitted to return the Key to the Landlord for nearly four Months after: however, they were not asked for it, and they made no Use of the Premises. Held, that they were not liable to the Landlord as Assignees of the Lease.

The Assignees having allowed the Bankrupt's Effects to remain

(*a*) The Pleas were similar to those in *Turner* v. *Richardson*, 7 *East*, 335.

of

1813.
WHEELER
v.
BRAMAH
and Another,
Assignees of
BORMAN.

of the Defendants accepted a Bill for the Arrears; and it was agreed between him and the Plaintiff, that the Lease should be put up to Sale, to see if it were worth any Thing. On the 28th of that Month, it was accordingly put up, but there was no Bidding for it. The Key was not sent by the Defendants to the Plaintiff till the 21st of *September* following; they, however, made no Use of the Premises. The Indenture of Lease remained all along in the Hands of the Bankrupt's Attorney, who had a Lien on it.

Lord ELLENBOROUGH.

The Defendants have done Nothing to render themselves liable as Assignees of this Lease. They paid Rent, not as Tenants, but for the express Purpose of preventing a Distress: protesting that they did not mean to take the Term, unless it should be found valuable. The Premises were put up to Sale with the Plaintiff's Concurrence; and it is admitted the Defendants had a Right to make this Experiment, without incurring any Liability to the Landlord. The only other Circumstance relied on, is the Delay to send the Key; but that Omission is not tantamount to taking Possession of the Premises; and the Defendants must be taken to have repudiated the Lease, as they had a Right to do.

1813.
Monday,
March 1.

SMITH and ANOTHER, Assignees, &c. *v.* CURRIE. 349, 350.

A Trader who is denied by his own Orders to a Creditor, in the Habit of calling upon him to demand a Debt when he is at Dinner, does not commit an Act of Bankruptcy, if his Intent be to avoid Interruption at that Hour, and not to delay the Creditor, although the Creditor be thereby delayed.

A CARRIER's collecting Clerk was in the Habit of making his Rounds between one and two o'Clock, which was the Time when the Bankrupt dined. The

Bankrupt

1813.

SMITH and Another, Assignees, &c. v. CURRIE.

Bankrupt told his Servants, that the Clerk was troublesome in calling for Money at that Hour, and desired he might be denied to him. The Clerk called twice afterwards, between one and two, to demand a Debt due to the Carrier; the Bankrupt was at Home, and was, in Pursuance of his Directions, denied. He was accessible to his other Creditors at business Hours. The Question was, whether this was an Act of Bankruptcy.

Lord ELLENBOROUGH.

Bankruptcy the Law considers as a Crime; and the Intention of the Act must be examined. A Trader may not only order himself to be denied at unseasonable Hours in the Night; but in the Course of the Day, when he is taking his Meals, and on other Occasions, which can easily be imagined, may refuse to see his Creditors, without meaning to delay them, and therefore without committing an Act of Bankruptcy, although they should be delayed.

Ex parte Osborne, post, N.

In the Matter of DALTON, a Bankrupt.

Ball and *Beatty*'s Reports of Cases in the High Court of *Chancery, Ireland*, during the Time of Lord Chancellor *Manners*, vol. i. p. 130 (*a*).

A BANKRUPT arrested during the enlarged Time for passing his last Examination, ordered to be discharged upon Motion (*b*).

(*a*) The Enactments of the English Statutes having been adopted in *Ireland*, the Law of Bankruptcy is the same in both Countries.

(*b*) *Vide ante*, p. 230. 264, N.

Ex parte

1809.
June 30.

Ex parte USHER.

1 *Ball* and *Beatty* Rep. 197. 199.

The Court will not, (sitting in Bankruptcy) on Behalf of the Sureties of a Bankrupt, direct a Sale of mortgaged Premises, for Payment of a Debt secured by Recognizance. Recognizance by a Guardian in the Matter of a Minor, is not a Debt due to the Crown, upon which an Extent can issue; as the Debt not being of a public Nature, is not altered by the Form of the Security.

THE Bankrupt having been appointed Guardian to a Minor, entered into a Recognizance with Sureties, to account for the Property. A Petition was presented by the Sureties, praying that certain mortgaged Premises belonging to the Bankrupt, might be sold to discharge the Mortgage Debt; and the Residue applied to satisfy a Debt due upon the Recognizance: insisting, that the Debt upon the Recognizance was a Debt upon Record due to the Crown (*a*); and that it was only where the Debt was not of Record, that, in order to bind the Land, an Extent should be issued (*b*).

The Lord CHANCELLOR (*c*).

Supposing this to be a Debt due to the Crown, I think the Party must issue an Extent upon it before I can act in this summary Way in Bankruptcy. It certainly does not appear to me to be a Debt due to the Crown, nor to warrant the awarding of an Extent upon it; it is not a public Debt, and the Form of the Security does not alter the Nature of it.

The Petitioners were permitted to prove, without Prejudice to the Question upon the Security.

(*a*) *Bac.* Abrid. *Gwillim's* Edit. vol. ii. 374. *King* v. *Cotton*, *Parker's* Rep. 112.

(*b*) 2 *Saund.* 70, Note 3. Irish Stat. vol. xii. 209. *Audley* v. *Halsey*. Sir *W. Jones*, 202. *Brassy* v. *Dawson*, 2 *Strange*, 982. *Anon.* 2 *Atk.* 262. *Austen* v. *Whitbread*, 6 T. R. 438.

(*c*) Lord *Manners*.

Ex parte

Ex parte PARTINGTON.

1 *Ball* and *Beatty* Rep. 209, 210.

THIS was an Application to open Biddings at a Sale before the Commissioners; it was opposed on the Ground that the Deed had been executed, and the Purchaser put into Possession.

The Lord CHANCELLOR (*a*)

Allowed the Objection, but thought, though not aware of any decided Case where Biddings had been opened in Bankruptcy, that it might be done upon an early Application, and under proper Circumstances.

As to opening Biddings in Sales under Decrees, *vide* *White* v. *White*, 14 *Ves.* 151.

(*a*) Lord *Manners.*

Ex parte HIGGINS.

1. *Ball* and *Beatty*, 218, 219.

AN Assignee having absconded, this was an Application that another might be appointed in his Place.

The Lord CHANCELLOR (*a*)

Doubted whether he could make the Order; observing, that by the Assignment of the Commissioners, the legal

(*a*) d *Manners.*

Title

Ex parte HUGHES.

Title vests in the Assignee; and during his Life, no other can act, unless by Assignment from him; or, in Case of his Death, from his personal Representative: but upon *ex parte Bainbridge* (*a*) being referred to, he made the Order.

(*a*) 6 *Ves.* 450. *Ex parte Lemon*, 13 *Ves.* 271. *Ex parte Beddam, ante*, 310.

1810. *Jan.* 27.

HIGGINSON *v.* KELLY.

1 *Ball* and *Beatty* Rep. 252. 257.

Trader, by Settlement on Marriage, in Consideration of £1000, the Wife's Fortune, conveyed his House to Trustees, to his own Use till Death or Bankruptcy; then in either Event to raise £1000 for her separate Use. This is a fair and valid Settlement, in Nature of a Mortgage, to secure the Wife's Fortune. On Bankruptcy of the Husband, Application by his Assignees for an Injunction to restrain the Trustees from recovering the House at Law refused.

Marriage Settlement of Trader, not securing the Wife's Fortune in the Event of Bankruptcy, the Intention appearing to be so, amended accordingly.

THE Bill filed by the Assignees of *Kelly*, a Bankrupt, stated, that *Kelly* on his Marriage in 1803, in Consideration of £1000, the Fortune of his intended Wife, conveyed by Deed to the Defendants, his Interest in a House held for a Term of Years, upon Trust, to permit him to receive the Rents and Profits until his Death, or until he should happen to fail in his Credit or Circumstances, or become a Bankrupt, whichever should first happen; and in Case any of the above Events should take Place during the Life of his intended Wife, that the Trustees should immediately after raise by Sale or Mortgage £1000, and should pay it to the intended Wife, and not be liable to the Debts and Engagements of *Kelly*. *Kelly* in *November* 1807 became bankrupt; the Defendants, the Trustees in the Deed, brought an Eject-

ment

1810.

HIGGINSON v. KELLY.

ment to recover the House; and the present Bill was filed to restrain them from proceeding in it. A Motion on Behalf of the Plaintiffs was made at the Rolls for an Injunction, which was refused, and the Plaintiff now moved to set aside that Order.

The Lord CHANCELLOR (*a*).

A Trader cannot on Marriage, secure a Provision out of his Property for his Wife, in the Event of Bankruptcy, in Prejudice to his Creditors.

The Rule of Law, as stated by the Counsel for the Plaintiffs (*b*), that a Trader cannot on his Marriage settle his Property in such a Manner that, in the Event of his Bankruptcy, his Wife shall be entitled to a Provision out of it in Prejudice to his Creditors, is perfectly correct (*c*): and if they could have satisfied me that such was the Case before the Court, I should have no Hesitation in granting the Injunction. But though the Property in this Case, strictly speaking, is the Husband's, yet it in Reality is the Fortune of the Wife, intended as a Provision for her and her Children in the Case of the Bankruptcy of her Husband, and advanced to him on Condition that the Wife should have it again on that particular Event, he giving a Security for it on his own Property, in Nature of a Mortgage. That Event having happened, the Wife becomes a Creditor on this particular Fund, and is entitled to have the Benefit of her special Lien on this Property. It has been decided by Lord *Redesdale*, that a Settlement of this Description is good to the Extent of the Property of the Wife (*d*). It is then contended, that this Settlement being by Deed executed, the Court is not at Liberty to reform or alter it. The same Question

(*a*) Lord *Manners*.

(*b*) The *Solicitor-general*, Serjeant *M'Mahon*, and Mr. *Hawkesworth*.

(*c*) *Ex parte Murphy*. 1 *Scho.* and *Le Froy*, 44. *Ex parte Meaghan, ibid.* 179.

(*d*) *Ex parte Meaghan*, 1 *Scho.* and *Le Froy*, 179. *Ex parte Hinton*, 15 *Ves.* 519. *Lockyer* v. *Savage*, 2 *Strange*, 947.

came

1810.

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came before me in the Matter of *Standford*, a Bankrupt (*a*). The Case was in Circumstances nearly the same as the present. I had some Doubts, and finding the Question had never been the Subject of Decision, I had a Communication with Lord *Eldon* and Lord *Redesdale* upon it. I stated to them it appeared that the Intention on executing the Settlement was, that the Fortune of the Wife should be a Provision for her; but through Mistake, it was made to appear the Property of the Husband: and I submitted to them, whether they were of Opinion I could so far correct the Deed of Settlement to meet the Intention of the Parties, as to amend the mistaken Form of the Deed, and mould it so as to be a valid Settlement. Both the learned Lords were of Opinion that I was at Liberty to do so, and I accordingly amended the Settlement. I am, therefore, in this Case, of Opinion, that the Settlement must be considered as made of the Fortune of the Wife of the Bankrupt, and that she, by Means of her Trustees, is at Liberty to proceed at Law to recover the House for the Purpose of the Settlement.

(*a*) *Ex parte Verner* in the Matter of *Standford*, 1 *Ball* and *Beatty*, 260, 261.

Marriage Settlement not providing that a Bond by Husband to Trustees for his Wife's Fortune should be proveable in the Event of his Bankruptcy, amended accordingly, such being the Intention of the Parties, and the Proof ordered to be admitted.

Ex parte Oxley, *ibid.* 257, 259. Marriage Settlement by Trader, giving his Bond and the Rents of his House to Trustees, for his Wife and Children in the Event of his Bankruptcy or Death, void for the former. But a Bond from the Father of the Wife, to Trustees on Marriage, for separate Use of the Wife, in Case of Bankruptcy of the Husband, declared valid.

Ex parte TALLIS.

June 5.

1 *Ball and Beatty's* Rep.

Bankrupt's Certificate obtained by Imposition practised upon the Great Seal, revoked, if no Injury to Persons subsequently dealing with the Bankrupt on the Faith of it. A Reference directed to ascertain that Fact.

THIS Petition, presented by several Creditors of the Bankrupt, stated that three of the Commissioners had signed a Certificate, stating that the Bankrupt had at one Period intended to conceal a Sum of seven hundred Guineas, Part of his Effects; but that he had afterwards made a Disclosure of it: on which Ground, and because four-fifths of the Creditors had signed, the Commissioners were induced to sign the Certificate. The Certificate contained that special Clause for the Purpose of drawing the Attention of the Lord *Chancellor* to those Facts, when the Certificate should be presented to him. The Agent to the Commission lodged this Certificate in the Bankrupt Office, as if it were drawn in the usual Form, and the Lord *Chancellor* signed it, conceiving it to have the full Approbation of the Commissioners.

The Lord CHANCELLOR (*a*)

Entertained not the least Doubt of his Authority to revoke the Certificate, and declared his Intention so to do, if, upon Enquiry before the Commissioners, it was found (the Certificate having been allowed three Years) it could be done without Injury to Persons who might have been engaged with the Bankrupt in subsequent Transactions.

(*a*) Lord *Manners*.

1 *Mont. Dig.* 578.

1811.
February 1.

Ex parte CHARLES.—In the Matter of CHARLES (*a*).

A Plaintiff in an Action for a Breach of Promise of Marriage having recovered £100 Damages against a Trader, who between Verdict and Judgment commits an Act of Bankruptcy, held that the Debt upon the Judgment is not a good petitioning Creditor's Debt.

THIS was the Petition of the Bankrupt to supersede his Commission, upon an Objection to the petitioning Creditor's Debt.

Mary Howell, Spinster, brought an Action on the Case against *J. Charles*, for a Breach of Promise of Marriage; and on the 5th of *December* recovered a Verdict against him for £150 Damages. On the 25th of *December*, *Charles* committed an Act of Bankruptcy. On the 31st of *January* following, Judgment was entered up on the Verdict for £150, and £133 Costs; and upon this Debt *Mary Howell*, on the 4th of *February*, petitioned for and obtained the Commission in Question.

The Lord CHANCELLOR

Was of Opinion, that the Judgment being after the Bankruptcy, was a fatal Objection to the Debt, but offered the Respondents a Case, which they accepted.

A Statement of the above Circumstances was accordingly submitted as a Case for the Opinion of the Court of *King's Bench*. The Court certified that the Debt was not a sufficient Debt in Law to sustain the Commission.

(*a*) 16 *Ves.* 256. 14 *East*, 197.

Ex

LINCOLN'S INN HALL.
1813,

January 14.

Semble that a Scavenger is not a Trader within the Bankrupt Laws. Issue directed, in Preference to leaving the Bankrupt to his Action, when the Commissioners have not had the Circumstances of Trading, &c. fully before them. The Proceedings in the mean Time suspended upon the Doubt as to the Bankruptcy.

Ex parte COLLINS.

THIS was the Petition of the Bankrupt to supersede his Commission, on the Ground of there having been no Trading. He was a Scavenger, and gave an annual Sum to the Overseers of *Saint Pancras*, for the Privilege of removing the Dust, &c. within the Parish (*a*). This, it was contended, was a Buying. He was described as a Buyer and Seller of Dust, Breeze, and Ashes, Dealer and Chapman.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Montagu* in Support of the Petition.

Sir *Arthur Pigott*, Mr. *Leach*, and Mr. *Cullen* for the petitioning Creditor, submitted that the *Chancellor*, where there was a legal Objection arising out of contradicted Facts, would not supersede in the first Instance, but would leave the Bankrupt to his Action, or at most would direct an Issue

The Lord CHANCELLOR.

It does not appear to me that the Commissioners can have had clearly before them the Nature of this Man's Trading. I have great Difficulty in making out, that a Scavenger contracting in this Way is within the Bankrupt Laws.

Let there be an Issue to try the Trading; Notice to be given of what Trading you mean to insist on (*b*); and let

(*a*) Under an Act of Parliament providing for the Regulation of the Parish in that Respect.

(*b*) It had been mentioned in the Argument that he was a Trader in various Ways independent of the Trading as "Scavenger."

1813.
Ex parte COLLINS.

the Proceedings be deferred till after the Trial of the Issue. The Jury to be at Liberty to indorse any Thing special on the *Postea*.

I prefer an Issue to an Action, where it appears that the Facts of the Case were not clearly before the Commissioners; and I postpone the Proceedings upon my Doubt as to the Bankruptcy.

LINCOLN'S INN HALL.
1813,
May 1.

Ex parte BRUCE.

Equitable Mortgage held to be created by Delivery of Deeds for the Purpose of preparing a legal Mortgage.

THIS was a Petition for a Sale of Premises, on which the Petitioner claimed a Lien by Deposit of Title Deeds; but it appeared that the Deeds had been delivered to him not as the Security, but in Order that a legal Mortgage might be prepared; and that Circumstance was relied on by the Assignees as an Objection.

Sir *Samuel Romilly* and Mr. *Hart* in Support of the Petition.

Mr. *Leach*, contra.

The Lord CHANCELLOR.

The Principle of equitable Mortgage is, that the Deposit of the Deeds is Evidence of the Agreement; but if they are deposited for the express Purpose of preparing the Security of a legal Mortgage, is not that stronger than an implied Intention?

Ordered.

Vide ex parte Coombe, p. 268. *Ex parte Warner*, p. 286. *Ex parte Whitbread*, 299, *ante*.

Ex

Michaelmas Term, 1812.

Wednesday, Nov. 11.

No Affidavits can be admitted against the Allowance of a Certificate, but such as have been filed in the Office at the same Time with the Petition; or are necessary in Reply.

It is a general Rule, that a Petition to stay a Certificate, if dismissed, is dismissed with Costs, unless the Bankrupt by Misconduct has forfeited that Privilege.

Ex parte THE BANK of SCOTLAND (*a*).—In the Matter of SMITH, STEIN, and Co.

SIR *Samuel Romilly* on the Part of the Bankrupts, requested the Lord *Chancellor*, that this Petition, which was to stay the Certificate and supersede the Commission, (Objects which claimed and always met the early Attention of the Court,) might be heard on the following *Friday*.

Sir *Arthur Pigott* and Mr. *Cullen* for the Bank of *Scotland* opposed it. 1st. The Bankrupts at their Bankruptcy, had been a trading Company in *Scotland* (as well as in *England*;) and there had become indebted to the Bank of *Scotland*, who at the Time of the Issuing of the Commission here, were proceeding against them to Sequestration; and a Question was then depending in the Court of Session of *Scotland*, between the Bank and the Assignees, how far the English Commission was operative on the Scotch Property (*b*), so as to preclude the Bank from the Fruit of their Sequestration; that Question was to come on the next Day in *Scotland*; and it was therefore hoped that the present Petition might not in the mean Time be advanced. 2d. The Bank wished to state some further Matter upon Affidavit.

The Lord CHANCELLOR.

With respect to the latter Objection, it has been long clearly settled by Lord *Rosslyn*'s general Order (*c*), that no Affidavits can be admitted against the Allowance of a Certificate, but such as have been filed in the Office upon the presenting of the Petition. I have so far relaxed that

(*a*) 1 *Vesey* and *Beames*, Rep. 5.

(*b*) *Vide* this Case, *post*.

(*c*) General Order, 12th *April*, 1796.

Rule,

1812.

Ex parte THE BANK of SCOTLAND.— In the Matter of SMITH, STEIN, and Co.

Rule (*a*), as to direct that Affidavits in Reply, if necessary, may be admitted; but no further. I desire it therefore to be understood, that if upon this Occasion I permit Sir *Arthur Pigott*'s Clients to file their Affidavits, it is not my present Opinion that they could be read if tendered (*b*).

Where in the Vacation, Petitions have been presented to stay Certificates, upon the Ground that the Petitioner's Debt would turn the Certificate, and the Bankrupt has contradicted that Allegation, I have, what I should not scruple to do again, referred it to the Secretary of Bankrupts or the Commissioners, to look into the Proofs upon the Proceedings, with a Direction, that if the Bankrupt were correct in his Contradiction, the Certificate should be allowed. A Question of Supersedeas has likewise a strong Claim to the early Attention of the Court; and without Prejudice to any Proceedings in the Courts of *Scotland*, let this Petition stand for *Friday* next.

Upon this Petition being mentioned again, the Petitioners had come to the Determination of withdrawing it; the only Point now was, whether they could be permitted to do so without Costs.

The Lord CHANCELLOR.

It is a general Rule, when a Petition to stay a Certificate fails, and there has been no Misconduct in the Bankrupt, that it fails with Costs. Without any Imputation or Blame therefore on the Bank of *Scotland*, but on the general Rule, I dispose of this Petition with Costs (*c*).

(*a*) General Order, 16th *November*, 1805.

(*b*) Whether Affidavits are necessary in Reply, is for the Decision of the Court, upon hearing the Affidavits in Answer. *Ex parte Gardner*, next Case. N.

(*c*) *Vide* the Note to *ex parte Stracey*, *ante*, p. 67. *Vide ex parte Gardner*, next Case.

Ex

Michaelmas Term, 17th *Nov.* 1812.

Ex parte GARDNER.—In the Manner of ASPINALL (*a*).

THIS was the Petition of a Creditor who had obtained Judgment in an Action against the Bankrupt, praying that the Commission might be superseded, as having been taken out to defeat the Execution, and that the Certificate might be stayed; or that if the Commission should be sustained, then that the Petitioner might be at Liberty to prove his Debt, and have the Certificate stayed in the mean Time.

The Ground of the Relief prayed was, first that there had been no Trading; the Bankrupt being merely in the Habit of selling Stones delved from a Quarry upon his own Estate.

As to this, the Affidavit of the Bankrupt stated, that he was a Buyer of Stones of various Sorts and Descriptions other than those of his own Quarry; and that he was so previously to the Purchase of the Quarry upon his own Estate.

It was then generally objected, that the Commission was concerted, collusive, and the Commission of the Bankrupt;

A Person selling Stone delved from his own Quarry is not a Trader within the Bankrupt Law; whether or not he becomes so by purchasing Stones from others, depends upon the Quantity and the Intention. If a Commission is clearly proved to be the Commission of the Bankrupt, it must be superseded; but it is no Objection to it, that it has been taken out to defeat an Execution. The Rule that a Petition to stay a Certificate, if dismissed, will be dismissed with Costs, is dispensed with if there has been Misconduct in the Bankrupt. Misconduct to stay a Certificate, must be Misconduct under the Bankruptcy.

(*a*) 1 *Vesey* and *Beames*, 45.

1812.

Ex parte GARDNER.— In the Matter of ASPINALL.

Bankrupt; that the Proofs under it, which had given him his Certificate, were those of his Relations; and that the Bankrupt had been in various Instances guilty of Misconduct.

Mr. *Leach* and Mr. *Cullen* in Support of the Petition (*a*).

Sir *Samuel Romilly* and Mr. *Newland*, contra.

The LORD CHANCELLOR.

Selling the Stones delved from his own Quarry is clearly not a Trading within the Bankrupt Laws. Whether or not his purchasing from others will make him, as he has been described, a Trader in Stone, by buying and selling Stone and dealing therein, must depend upon the Circumstances, viz. Quantity and Intention (*b*). If a Commission is clearly proved to the Satisfaction of the Court to be the Commission of the Bankrupt, it must be superseded (*c*); but it is no Objection to the Commission that it is taken out to disappoint an Execution (*d*); or to the Certificate, that the Proofs, (if Proofs upon actual Debts) have been

(*a*) When this Petition was called on, it was requested on the Part of the Petitioners, that it might stand over for the Purpose of filing Affidavits in Reply to that of the Bankrupt: and it was said, first, that Affidavits in Reply were *necessary* within the general Order of 16th of *November*, 1805; or, secondly, that this being a Petition to supersede the Commission, as well as to stay the Certificate, was not within the general Order of 12th of *April*, 1796. This Request was opposed.

The Lord CHANCELLOR.

The Practice, as far as concerns the Certificate, is to hear the Petition; and then for me to say whether further Affidavits are necessary.

(*b*) *Ex parte Magennis*, *ante*, p. 84.

(*c*) *Ex parte Downes*, *post*.

(*d*) *Ex parte Gouthwaite*, *ante*, p. 87.

made

made by Relations: to whom is a Man in Distress so likely to apply for Assistance as to his own Family?

With respect to Misconduct, I have over and over again said, and I am anxious to repeat it, as my Authority is supposed to be much more extensive, that neither the Great Seal nor the Commissioners can withhold the Certificate for Misconduct, unless upon Misconduct under the Bankruptcy, and for Nonconformity to the Bankrupt Laws. There is not enough of Misconduct in this Case to operate against the Bankrupt's Certificate, though sufficient to induce me to withhold from him the Costs of this Application.

Petition dismissed without Costs (*a*).

(*a*) *Vide ex parte* the Bank of *Scotland*, the preceding Case.

Ex

Michaelmas Term, 1812. 13th, 16th, 18th *Nov.*

Ex parte FREEMAN.—In the Matter of DAVIS and LLOYD.

Although a Commission, having become supersedeable for Non-prosecution within the 28 Days, according to the Provisions of the general Order of the 20th of *June*, 1793, has been actually superseded; yet a second Commission is not, as a Matter of absolute Right, to be granted to another Solicitor; but, under Circumstances, the first Commission may revive.

ON the 25th of *September*, 1812, a Commission issued against *Davis* and *Lloyd*, directed to Commissioners in the Country. On the 30th the Commissioners

Where there is a *bonâ fide* Intention to prosecute a Commission, the general Order may be dispensed with, upon Accident, Sickness of Commissioners or Witnesses, or Adjudication too late for the *Gazette*; but strict Proof required of a *bonâ fide* Intention to prosecute.

A second Commission, which had issued upon a Supersedeas of a former one, for Non-prosecution within the 28 Days, was directed to be superseded, and the first Commission to proceed, on the Ground that there was a true *bonâ fide* Intention of executing the first, delayed only by the Refusal of the Witness, who could prove the Act of Bankruptcy, to attend the Commissioners for that Purpose, and Notice to the Solicitor who struck the second Docket, that a Petition had been presented to compel the Attendance of that Witness, and that the Commission was intended to be prosecuted.

An Instrument, although the Great Seal has been affixed to it, is inoperative while it remains in the Hands of the Lord *Chancellor*; but a Delivery to a Messenger, although the Instrument is not taken out of the Bankrupt Office, is a Delivery to the Party.

The Great Seal is in no Instance compelled to supersede a Commission, except by the imperative Language of the Statute 5 *Geo.* II. c. 30. s. 24, (where a petitioning Creditor receives from the Bankrupt greater Security or Satisfaction for his Debt than the Rest of the Creditors;) but it is in the Habit of exercising a discretionary Power of Supersedeas, to prevent an Abuse of a Commission, as a Process in the Nature of an Execution; and from Analogy to the Practice of the other Courts in this Respect.

Proof of an Act of Bankruptcy is a sufficient Proceeding under the general Order

met;

met; but *Lloyd*, who was desirous of having a Commission executed in Town, with a View to prevent his being declared a Bankrupt under the existing Commission, prevailed upon *Shelton*, a Witness to his Act of Bankruptcy, to conceal himself, and not to obey the Commissioners' Summons for his Attendance before them.

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On the 16th of *October* a Petition was presented, stating, as the Truth was, that the Prosecution of the Commission was delayed only by the Refusal of *Shelton* to prove *Lloyd*'s Act of Bankruptcy, praying that he might be directed to attend for that Purpose, and that the Time for Proceeding in the Commission might be enlarged. This was answered for the next Day of Petitions, before which Time the 28 Days expired, and the Commission became supersedable by the general Order (*a*). A second Docket was then struck against *Davis* and *Lloyd* by another Solicitor; and on the 26th of *October*, the second Commission and the Writ of Supersedeas of the first, were forwarded by a special Messenger to the Lord *Chancellor* in *Dorsetshire*, who as a Matter of Course, on the 28th of *October*, superseded the first Commission, and sealed the second. On that same 28th of *October*, the Commissioners under the first Commission were enabled to find *Lloyd*'s Bankruptcy, upon the Evidence of one *Ann Davis*, whom they had accidentally discovered; but the Officers at the Bankrupt Office, after the Writ of Supersedeas, refused to authorize the Publication in the *Gazette*. Previously to the Messenger's being despatched, the second Solicitor had Notice, that the first Commission was to be prosecuted as soon as the Attendance of *Shelton* could be compelled: The first Solicitor had Notice that a second Commission, and a Writ of Supersedeas of the first, was to be despatched to the Lord *Chancellor*.

(*a*) 26th of *June*, 1793. *Vide* the Note at the End of this Case.

This

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This Petition prayed that the second Commission might be superseded; that the Writ of Supersedeas against the first Commission might be revoked, and that Commission revived by a Writ of *Procedendo*.

Sir *Samuel Romilly* and Mr. *Wray* in Support of the first Petition, argued upon the Circumstances. That here was not a Want of Prosecution within the general Order (*a*), or at least that it was a Case in which the Order ought not to be enforced. They cited *ex parte Ellis* (*b*), *ex parte Leicester*, *ex parte Layton* and *Hardwicke* (*c*), *ex parte Sanden* (*d*).

Mr. *Leach* and Mr. *Heald*, contra, contended that the general Order gave an absolute Right, which an innocent Party ought not to be deprived of; and distinguished the Cases cited from the present.

The Lord CHANCELLOR.

The Lord *Chancellor* having thought it right, regard being had to the Practice of the Court, to order an Attendance upon the Petition presented to him on the 16th of *October*, may be considered as having given so far his Opinion, that the general Order admitted of Exception. If I had been sitting, or of easy Access on that 16th of *October*, I should have made an Order for an immediate Attendance; it clearly appearing to be the Intention of the Parties upon that Petition, that the Commission should be *bonâ fide* carried into Effect.

If the Writ of Supersedeas had not actually issued, the Declaration of the Bankruptcy upon the Evidence of *Ann Davis* would have been a Proceeding under the general

(*a*) 26th of *June*, 1793.
(*b*) 7 *Ves.* 135.
(*c*) 6 *Ves.* 429. 439.
(*d*) *Ante*, p. 85. *Vide* Note at the End of this Case.

Order

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Order within the Cases upon this Subject. Though Instruments are not considered as sealed, for the Purpose of proceeding upon them, while they remain in the Hands of the Lord *Chancellor*; yet they must be considered as operating, from the Moment they were delivered to the Messenger; and that, speaking from Recollection, I believe was antecedent to the Declaration of the Bankruptcy. Taking the Delivery to the Messenger, therefore, to be the Delivery of the Writ of Supersedeas to the Party, although it remained in the Bankrupt Office, and the Commission therefore as actually superseded before the Adjudication took place, the Question is, whether I have Authority to direct a *Procedendo* upon the former Commission, and what I can do as to Costs.

It has been argued, that a Party availing himself of the general Order, and coming within the Terms of it, has a Right to have this second Commission. It is quite a different Question, what Effect taking out the Supersedeas and issuing out the second Commission shall have, as to Costs; and whether, notwithstanding any intermediate judicial Order or Interposition of the Lord *Chancellor*, if it is within the Order a Case of absolute Supersedeas, the Party has a Right so to consider it.

In none of the Statutes is there any Direction to the *Chancellor* to supersede, except where in Words leaving him no Discretion not to supersede, a petitioning Creditor privately receives from the Bankrupt greater Security and Satisfaction for his Debt than the Rest (*a*) of the Creditors. The Court however has been in the Habit of considering a Commission as a Species of Execution, and of exercising the same discretionary Power over it, to prevent an Abuse of it as a Process, as the other Courts are in the Habit of exercising over their respective Writs

(*a*) 5 *Geo.* II. c. 30. s. 24.

and

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and Executions. That discretionary Power was early and properly exercised in *ex parte Puleston* (*a*); and up to the Time of this general Order, we collect from the Language of it, that if after the issuing of the Commission, eight *Gazettes* had been published without any Proceeding, the Commission was supersedeable. The Order stating that, then proceeds to direct under what Circumstances a Commission shall be *supersedeable*; it does not imperatively adopt the Language of the Statute, "shall "and may be superseded (*b*)." The *Chancellor* therefore is left to his Discretion in the Application of a Rule, as a Guard against Fraud in the Execution of Commissions, where independently of the Observation, that no *Chancellor* can lay down a Rule inflexibly to bind his Successor, if he were not so left to his Discretion, a Rule intended to prevent Fraud must be frequently made an Instrument to extend it, by destroying Commissions intended *bonâ fide* to be executed.

The Rule, that nothing but Advertisement of the Adjudication in the *Gazette* shall satisfy the Intention of the Order, would be most unwholesome. I am still of Opinion, that holding the Party to the strongest Proof of a *bonâ fide* Intention to prosecute the first Commission, Circumstances, such as the Sickness of a Commissioner or a Witness, or Adjudication too late for the *Gazette*, may relax the Rigour of the Order (*c*).

The Supersedeas in this Case was obtained without disclosing to me the particular Circumstances under which it was applied for. If my Memory had supplied me with the Fact, that I had ordered an Attendance upon the Petition presented to me on the 16th of *October*, for the

(*a*) 2 *P. Wms.* 545. *Ante*, 333.

(*b*) 5 *Geo.* II. c. 30. s. 24.

(*c*) *Vide* the Order, and the Cases in the Note.

next

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next Day of Petitions, that is, a Day subsequent to the Time at which this Commission by the general Order became supersedeable, I should have certainly adopted either one or other of these Modes; first to reconsider, whether attending to the true Meaning of Lord *Rosslyn's* Order, I was right in so directing an Attendance upon that Petition; if so, to have withheld the sealing of the Supersedeas; and if not, to have stated to my Secretary, that I had made the Order under a Mistake, and that the Party claiming the second Commission was entitled to it.

Upon the Ground therefore, that this Supersedeas has issued without a Disclosure to me of the Circumstances under which it was applied for; that there was a *bonâ fide* Intention to proceed with the first Commission, prevented only by the Concealment of this Witness to the Act of Bankruptcy, kept out of the Way on Purpose, and who it is not denied could have proved it; and that it was known to the Party that a Petition had been presented to me, and the Order of Attendance made upon it; I shall direct the first Commission to proceed, and the second to be superseded: But I shall not now dispose of the Question of Costs.

Wednesday, 26th of *June*, 1793.

Whereas by the Practice which hath obtained for some Years past, eight *Gazettes* must have been published after the issuing a Commission of Bankrupt, before any other Person than the Attorney who sued out such Commission can procure the same to be superseded, for Want of Prosecution: And whereas the Time so allowed for prosecuting such Commissions as are to be executed in the City of *London* is found to be unnecessarily long, and the Preference which the Attorney suing out such Commission obtains in superseding the same for Want of Prosecution, and consequently in suing out another Commission upon the Petition of some other Creditor, immediately after such Supersedeas, hath been likewise found to be prejudicial to the due Course of Proceeding in the suing out and prosecuting Commission of Bankrupt: I do therefore order, that any Commission of

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of Bankrupt which shall be sued out from and after the twenty-sixth Day of *June* instant, and to be executed in the City of *London*, shall be supersedeable (for Want of Prosecution) at the Expiration of fourteen Days, and no sooner, after the Date thereof; and that any Commission of Bankrupt which shall be sued out from and after the said twenty-sixth Day of *June* instant, and not to be executed in the City of *London*, shall be supersedeable (for Want of Prosecution) at the Expiration of twenty-eight Days, and no sooner, after the Date thereof.

And I do further order, That one Day shall elapse after the Expiration of the said fourteen or twenty-eight Days, before any Order shall be made for such Supersedeas; and that the Application which shall in the Course of that Day be first made, by any other Attorney or Solicitor than the Attorney or Solicitor at whose Instance the supersedeable Commission was issued, for a Supersedeas of such Commission, and for a new Commission to be issued, shall be preferred to an Application for the same Purposes by the Attorney or Solicitor who sued out such supersedeable Commission.

Loughborough, C.

Ex parte ELLIS, 7 *Ves.* 135.

Commission on the 1st of *May*. On *Saturday* the 15th, the Bankruptcy was found, but too late for the *Gazette*. The Time between the issuing of the Commission and the Adjudication, had been employed in an Endeavour to arrange the Bankrupt's Affairs by a trust Deed. The Solicitor, when he applied for the Supersedeas, knew of the Adjudication. The Bankruptcy and the Supersedeas both appeared in the next *Gazette*.

The Lord *Chancellor*.

I do not like the Practice of lying by, to see if any Arrangement can be made. I cannot say the Order is not satisfied till Publication in the *Gazette*: suppose Adjudication on *Wednesday*, the Publication could not be till *Saturday*. Let the Writ of *Procedendo* issue.

Ex parte LEICESTER, 6 *Ves.* 429.

Ex parte LAYTON . . . . . } 434.
Ex parte HARDWICK . . . }

A Commission *supersedeable*, though an Order be made for that Purpose, is not *superseded* till the Writ issues.

On the 25th of *July*, the Time allowed by the Order for opening the Commission expired; on the 27th, the *Order* of Supersedeas was obtained; but on the 29th, before the *Writ* was sealed, the Bankruptcy was declared, and Notice given to the adverse Solicitor.

Lord *Chancellor*.

An *Order* for a Supersedeas is not a Supersedeas, but merely a Declaration of the Court, which Circumstances may induce it to recal, as indeed it would the Writ itself, if improvidently issued. The Commission, though supersedeable, is an operative Process, till actually superseded. The Commission was sustained.

Ex parte Sanden, *ante*, p. 365.

Ex parte MALTBY.—In the Matter of SIMMONS.

COUNCIL ROOM, LINCOLN'S INN, 28th *July*, 1813.

HAINES, a Creditor of the Bankrupt, having become deranged in his Mind, the Petitioner, at the Request of his Family, had undertaken the Management and Superintendance of his Business. He now presented this Petition, praying to be at Liberty to prove the Debt due from the Bankrupt to *Haines*, and to vote in the Choice of Assignees, upon an Affidavit of the above Facts, and upon a Certificate of Dr. *Munro*, that *Haines* was deranged.

No Commission of Lunacy had issued.

Mr. *Hall*, in Support of the Petition.

The VICE-CHANCELLOR

Thought the Application reasonable, and made the Order.

LINCOLN'S INN HALL, 30th *July*, 1813.

Ex parte OSBORNE.—In the Matter of PARR.

THIS was an Application to supersede a Commission, upon the Ground that the Bankrupt had not committed an Act of Bankruptcy; or, that if he had, it

A Creditor is not a competent Witness to prove the Act of Bankruptcy. A Departure from the Realm, occasioning the Delay of Creditors, is not an Act of Bankruptcy, unless at the Time of Departure there was an Intention to delay. The Deposition of the Witness proving such Act should state an Intention, or Circumstances from which the Court will necessarily infer it. The Departure of a Man in embarrassed Circumstances is strong, but not conclusive Evidence of Intention.

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had been proved by a Creditor, who, as such, was an incompetent Witness for that Purpose.

William Parr the Bankrupt, in the Year 1807 quitted his Residence at *Liverpool*, and went to *Rio Janeiro*, leaving his Wife and Family residing at *Liverpool* in a Leasehold House, with his Furniture and Effects to a considerable Amount. Previously to his quitting *Liverpool*, the following Advertisement had appeared in the public Papers there.

"For *Monte Video*, with Liberty to proceed to *Buenos* "*Ayres*, should it be in possession of the British, the "Brig *Phœnix*, mounts twelve Six-pounders; three "Years old; sails very fast. The principal Part of her "Cargo being engaged, she will be cleared for Sea in "all this Month. For Freight, &c. apply to *William* "*Parr*, or *Graham*, *Rigg*, and Co. *William Parr* "goes out in the *Phœnix*, with an Intention of settling "in *La Plata*, and will take Charge of any Shipments "*per* said Vessel."

The Docket was struck in the Month of *December*, 1812; the Commission was opened on the 24th Day of the same Month, but no Act of Bankruptcy could be proved; the Commissioners, therefore, adjourned to the 30th, and then found the Bankruptcy upon the following Deposition.

"30th *December*, 1812.—At the *Shakespeare* Tavern, "in *Birmingham*, in the County of *Warwick*, *Gabriel* "*Filer* being sworn and examined, the Day and Year "and at the Place first above written, upon his Oath "saith, that he knows *William Parr* late of *Liverpool* "in the County of *Lancaster*, but now of *Rio Janeiro*, "in the *Brazils*, Merchant, Dealer and Chapman, and "hath

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" hath known him for twenty Years and upwards last " past. That in the Year 1807, the said *William Parr* " left *England*, and went as this Deponent is informed " and believes, to *Rio Janeiro*, and has not since returned " to *England*. That before, and at the Time he left " *England*, he was indebted to him this Deponent, in " the Sum of £50 and upwards; and he was then con- " siderably indebted, as Deponent believes, to many other " Persons. That this Deponent has repeatedly applied " to the said *William Parr* for the Payment of Depo- " nent's Debt, and urged the Payment thereof; and the " said *William Parr* has frequently promised Deponent " to pay the same, but has always neglected so to do. " That in the Years 1802, 1803, and 1804, this Depo- " nent raised many hundred Pounds for the said *William* " *Parr*, for his Accommodation, by Promissory Notes " drawn by this Deponent, payable to the said *William* " *Parr*, and afterwards discounted by this Deponent, " with *Parr's* Indorsement thereon with other Persons; " and by discounting Notes drawn by the said *William* " *Parr*, payable to and indorsed by this Deponent. And " this Deponent well knows, that the said *William Parr* " was then much embarrassed in his Circumstances, and " in great Want of Money. That for some Time before " the said *William Parr* so went to *Rio Janeiro*, he had " been a Clerk to his Brother in *Liverpool*; and when he " left this Country for *Rio Janeiro* he left no Partner or " Clerk behind him, nor had he then any Warehouse or " Place of Trade, but only a House in *Liverpool* occu- " pied by his Wife and Family. That the Deponent has " been delayed, by the Absence abroad of the said *William* " *Parr*, from recovering the Debt due to him; and his " other Creditors have also been delayed in the Payment " of their Debts by such Absence abroad of the said " *William Parr*, as this Deponent believes."

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Sir *Samuel Romilly* and Mr. *Cooke* in Support of the Petition, insisted that as *Parr*'s Intention at the Time of his going abroad was fair and notorious, his Creditors being delayed would not make it an Act of Bankruptcy; that *Woodier*'s Case had been much controverted, particularly by *Fowler* v. *Padget (a)*. 2d. That if this were an Act of Bankruptcy, it had been proved by inadmissible Testimony.

Mr. *Hart contra* contended, that a Trader's going abroad to settle, and his Creditors thereby delayed, was an Act of Bankruptcy. The Court would infer the Intention from the Fact. In answer to the second Objection, that the Act had been proved by a Creditor, he cited *Williams* v. *Stevens*.

The Lord CHANCELLOR.

The Commissioners in adjudging this Man to be a Bankrupt, have found the Act of Bankruptcy upon the Testimony of a Witness, who being a Creditor, was incompetent to give that Testimony; and who, even if he were admissible, does not, in Fact, prove an Act of Bankruptcy; for he does not say that *Parr* departed the Realm with Intent to defraud his Creditors of their just Duties. If that was a necessary Inference from his Conduct at the Time of his Departure, the Court, I admit, would dispense with the precise Allegation of it in the Deposition. The Question is, if *eo instanti* he departed the Realm, he so departed it with Intention of defrauding his Creditors. I agree, if a Man in embarrassed Circumstances departs the Realm, that is strong Evidence of an Intention to delay his Creditors; but I do not go the Length of saying, that his being pressed by Debts at the Time is conclusively an Act, because much must

(*a*) *Vide* the Cases in the Note.

depend

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depend upon the Circumstances of his Conduct at the Time of his Departure; and it is here a singular Circumstance, if this Man's Intention were to delay his Creditors, that he should have taken the very Step to prevent his putting that Intention into Effect. He would never have circulated that Advertisement, if his Intention were such as has been contended. There is no Evidence therefore that at the Instant of his Departure, he departed the Realm with Intention to delay his Creditors; and it is too much, after the Lapse of Time since the issuing of this Commission, to permit these Creditors to say, give us the Chance of a Trial at Law (*a*) to ascertain with what Intention that Departure took Place: considering therefore the Time that has elapsed since this Commission issued; the Adjournment of the Commissioners; that now upon the Hearing of the Petition no Person is mentioned capable of proving an Act of Bankruptcy:—I have no Hesitation in directing the Commission to be superseded.

(*a*) It had been pressed in Argument, that the Lord *Chancellor* would not supersede without directing an Issue or an Action.

The Act of Bankruptcy considered in the above Case, was introduced by the Stat. 13 *Eliz.* c. 7. s. 1; viz. "a Trader, Subject born, "who shall depart the Realm, to "the Intent or Purpose to defraud "or hinder any of his or her Cre- "ditors, also a Subject born, of "the just Debt or Duty of such "Creditor." It was continued by the Stat. 1 *Jac.* 1. c. 15. s. 2. as a Trader Subject born "who shall "depart the Realm, to the Intent "or whereby his Creditors, being "Subjects born, shall or may be de- "feated or delayed of their just and "true Debts." There are contradictory Decisions upon this Act of Bankruptcy, whether a Departure from the Realm, occasioning the actual Delay of a Creditor, is sufficient, without an Intention of delaying. *Woodier* departed the Realm to avoid a Prosecution for Murder; *Harvey* departed the Realm with a Lady, who refused to become his Mistress unless he did: in both Cases Creditors were delayed. It was ruled by *Reeves*, C. J. in the first Case, and by *Buller*, J. in the second, that the Departure was an Act of Bankruptcy. *Bull.* Ni. Pri. 39. *Cooke's* B. L. 73. In *Fowler* v. *Padget*, 7 T. R. 509. all the Judges of the Court of *King's Bench* concurred with Lord *Kenyon* in Opinion,

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nion, that as Bankruptcy was a *Crime*, it was necessary that the *Intent* and the *Act* should both concur; that all Difficulties would be removed by reading "to the Intent *and* whereby" instead of, "to the Intent *or* whereby" in the Stat. of *Jac.*: and *Lawrence*, J. observed, that *Woodier's* and *Harvey's* Cases might have received the same Determination, on a different Ground. For though it was not their *immediate Object* to delay their Creditors; yet, as *that must be the necessary Consequence* of their Departure, it would be Evidence of their intending to delay. In *Robertson* v. *Liddel*, 9th *East*. 487, it was decided that a Departure from the Dwelling-house, *with Intent* to delay, was sufficient, though no Creditor was delayed; and commenting upon the copulative Construction of the Statute in *Fowler* v. *Padget*, Lord *Ellenborough*, C. J. suggested, that it might be read as follows: "to the Intent his Cre-"ditors shall, or whereby they "may, be defeated or delayed." *Vide* also *Williams* v. *Nunn*, 1 *Taunton* Rep. 270. In *Ramsbottom* v. *Lewis*, 1 *Camp*. N. P. Cases, 280, the Bankrupt had sailed for the Continent, under an assumed Name, with a Lady whom he had carried off from her Husband.

Lord *Ellenborough*.

"To make this an Act of Bank-"ruptcy, he must *eo instanti* have "contemplated the defrauding or "delaying of his Creditors. A Per-"son, however, may be supposed "to foresee and intend, whatever "is the necessary Consequence of "his own Acts; and if the neces-"sary Consequence of *Moffat's* "going Abroad was, that his Cre-"ditors should be delayed, then "I think, he committed an Act of "Bankruptcy.—Had there been "Proof of his being pressed by "Debts at the Time, I should not "have hesitated in saying, that he "had committed an Act of Bank-"ruptcy: but as the Evidence "stands, it is a Question for the "Jury."—In *Ex parte Mutrie*, 5 *Ves*. 578. the Lord *Chancellor* (*Rosslyn*) says, "a Man goes out "of the Kingdom with a *fair Inten-"tion and for a proper Purpose*; "that, it has been long determined, "will not be an Act of Bankruptcy, "though Creditors are delayed." In *Williams* v. *Nunn*, *Camp*. Ni-Pri. Ca. 1 *Taunt*. 270, it was decided, that if a Trader, whose House of Trade is in *Ireland*, comes to *England* on Business, and again quits this Country to avoid an Arrest, it is a departing the Realm within the Statute.

As to the other Point, the Proof of the Act of Bankruptcy by a Creditor, Lord *Ellenborough*, in *Williams* v. *Stevens*, is reported to have said, "a Creditor is clearly "an incompetent Witness, to in-"crease the Fund out of which "he may receive a Dividend; but "I do not see why he should not "be allowed to prove, what barely "goes to support the Commis-"sion, of which he has not availed "himself." 2 *Camp*. Nisi Prius Cases, 301. Upon this the Lord *Chancellor*, in another Case during these Sittings, in which *Williams* v. *Stevens* was cited, observed, "it "is not enough that the Creditor "has not availed himself of the "Commission; to make him a "competent Witness, it ought to "be certain that he never will."

LINCOLN'S INN HALL, 11th *Aug.* 1813.

Ex parte JEEKS.—In the Matter of GREEN.

An Assignee who has proved his Debt, and against whom, upon Petition here, an Action is directed to be brought (to try his Right to Property of the Bankrupt alleged to have been fraudulently delivered to him), cannot dispute the Validity of the Commission; if he does, it is at the Hazard of his Proof.

THIS was a Petition by a Creditor of the Bankrupt, complaining of certain Transactions between the Bankrupt and his Father, who was the Assignee; and praying the Removal of the Father from being Assignee; and that he might be directed to restore twenty Sacks of Flour, which it was alleged had been delivered to him by the Bankrupt on the Eve of the Bankruptcy, and in Fraud of the general Creditors.

Upon the opening of this Petition, it was agreed that the Right to retain the Flour should be tried in an Action of Trover, to be brought against the Assignee by the Petitioner; and the only Question now raised was, whether the Assignee was bound to admit the Validity of the Commission, upon the Trial of the Action.

Mr. *Leach* and Mr. *Cooke*, in Support of the Petition.

Mr. *Montagu*, for the Assignee, cited *Rankin* v. *Horner*, 16 *East.* Rep. 191 (*a*).

The Lord CHANCELLOR,

In the Course of the Argument said, if it is put to an Assignee here, who has proved, either to admit the Commission or not, and he elects to dispute it, he must do it at the Expence of his Proof. I do not dissent from the Case cited; but there is a vast Difference, even upon the

(*a*) *Rankin* v. *Horner*, 16 *East.* 191.

Trover by the Assignees of a Bankrupt, against an execution Creditor; the Defendant had given Notice under the 49th *Geo.* III. c. 121. that he intended to dispute the petitioning Creditor's Debt. Proof by the Plaintiffs, that the Defendant had proved his Debt under the Commission, held to be no Proof of the petitioning Creditor's Debt against him.

Reasoning

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Reasoning of that Case, between a Creditor who has proved, and an Assignee under the Commission.

The Assignee having agreed to restore the Property, the Case was not mentioned again.

Ex parte WOOLLEY.—In the Matter of RICHARDSON.

THE Petitioner's Proof had been rejected by the Commissioners, on the Ground that as he was proceeding in an Action, he ought, antecedent to the Admission of his Proof, to have produced the Rule of Discontinuance in the Action.

Mr. *Leach* and Mr. *Montagu*, in Support of the Petition, to be admitted to prove.

Sir *Samuel Romilly* and Mr. *Cullen contra*.

The Lord CHANCELLOR.

If the Creditor discontinues, he does it under the Uncertainty whether his Proof will be admitted or not; while, on the other Hand, by the Act of Parliament (*a*), the Proof or Claim in itself operates as a Discontinuance.

(*a*) 49 *Geo.* III. c. 121. s. 14.

Ex

LINCOLN'S INN HALL, 11th, 14th *December*, 1812.

Ex parte MENNETT.—In the Matter of HAMILTON.

See the Case of *Pirie* v. *Mennett*, *ante*, p. 359.

THIS Petition prayed that the Plaintiffs in that Action might be restrained by Injunction from farther proceeding in it, upon the Ground that the Commissioners in the Bankruptcy had, under the 5th *Geo.* II. c. 30. s. 28 (*a*), found a Balance of Account due from the Bankrupt to the Petitioner

The Lord CHANCELLOR

Thought the Set-off ought to be allowed, and directed the Injunction to issue.

(*a*) Directing that where there has been mutual Credit or Debts, between the Bankrupt and any Person, the Commissioners or Assignees shall state the Account, set one Debt against another, and ascertain the Balance.

LINCOLN'S INN HALL, 4th *August*, 1813.

Ex parte HARDY.

THIS Petition prayed, that the Solicitor to the Commission might be directed to deliver up to the Petitioners (the Assignees), the Commission, the Proceedings,

Books of the Bankrupt noticed or referred to by him on his last Examination, form Part of the Proceedings under the Commission, to be delivered with Costs to the Assignees, by any Person, who by Refusal to part with them, renders an Application to the Great Seal necessary for the obtaining of them.

and

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and the Books of the Bankrupt, and that he might pay the Costs of the Application. The Lien upon the *Proceedings* was at the Hearing abandoned; but it was insisted on as to the Books, which had been delivered to the Respondent by the Assignees, who upon their Election, had continued him as their Solicitor.

Sir *Samuel Romilly* and Mr. *Montagu*, in Support of the Petition.

Mr. *Hart contra.*

The Lord CHANCELLOR.

It has been so often decided, that there can be no Lien upon the Proceedings, that Costs will always be given against that Person, who by Refusal to deliver them up to the Assignees, drives them to an Application here to obtain them: and as the Bankrupt on his last Examination has noticed or referred to the Books in Question, they must be considered as Part of the Proceedings.

Ordered with Costs.

Ex parte Bullen, p. 134, *ante.*
Ex parte Sandison, p. 275, *ante.*

Ex

LINCOLN'S INN HALL, *August*, 1813.

Ex parte THELWALL.

To a Petition by a petitioning Creditor, that the Assignees may, out of Funds in their Hands, pay the Solicitor's Bill up to the Choice of Assignees, and which had been taxed by the Commissioners, it is a sufficient Objection, that the Commissioners have allowed Charges in it which ought to be expunged.

THIS was an Application by a petitioning Creditor, that the Assignees, out of Assets admitted to be in their Hands, might pay the Bill of Costs of the Solicitor to the Commission, which had been taxed by the Commissioners up to the Choice of Assignees.

Mr. *Cooke* objected to the Order being made, upon the Ground that the Commissioners, in their Taxation, had allowed many improper Charges.

Mr. *Agar*, in Support of the Petition, insisted that the Order was quite of Course; that even if the Charges were improper, the Petition could not be resisted on that Ground; a distinct Petition ought to have been presented by the Assignees, to have the Charges expunged: that the Practice in this Case was the same as on a Petition to be paid a Dividend *(a)*; that this Objection was a Hardship upon the petitioning Creditor, who is liable to the Solicitor, and had paid him upon the Faith of being reimbursed by the Assignees.

The Lord CHANCELLOR.

The petitioning Creditor is not bound to pay what the Commissioners have allowed improperly; he may apply here. The Act of Parliament says positively, that these

(a) *Ex parte Whiteside, ante*, p. 319.

Charges

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Charges (*a*) shall not be paid out of the Bankrupt's Estate, and how can I allow them?

No Order was made.

(*a*) Stat. 5 *Geo.* II. c. 30, s. 42. It was a country Commission, and some of the objectionable Charges were Payments to the Commissioners for travelling Expences, above the twenty Shillings limited by the Act. *Vide ex parte Hurbin, ante,* p. 58.

LINCOLN'S INN HALL, *August,* 1813.

Ex parte DOWNES.
Ex parte ANSLEY, &c.

The Lord CHANCELLOR.

ALTHOUGH a Creditor is entitled to a Commission of Bankrupt as a Matter of Right, yet it must be the Commission of the Creditor, and not of the Bankrupt; and although the Act of Bankruptcy may not have been concerted, yet if the Commission is clearly the Commission of the Bankrupt, and he evidently has the Management and Direction of it, the Court will not hesitate instantly to supersede it.

Vide Ex parte Gardner, ante, 378.

Ex

LINCOLN'S INN HALL, *August*, 1813.

Ex parte WILLIAMS.—In the Matter of WILCOCKS.

Where there is a Surplus of the Bankrupt's Estate, Creditors are not entitled to Interest upon Debts, unless it has been provided for by Contract, either express, or implied; and upon Bonds, not beyond the Penalty. An implied Contract to pay Interest may be raised from the Dealings between the Parties; as where the Debtor has been in the Habit of paying Interest upon such or similar Securities. Interest is computed and given upon Bills of Exchange, in an Action at Law, in the Nature of Damages, not strictly as Interest; and for a Breach of the Contract, not in Pursuance of it.

THIS Petition recited a former Petition (*a*), presented in this Bankruptcy, praying, that the Creditors under the Commission, whose Debts carried Interest, might be declared to be entitled to have Interest, accrued subsequent to the Date of the Commission, paid to them on their respective Debts.

On the Hearing of that Petition, it was ordered that all the Creditors of the said Bankrupts, by Bonds, Contracts, Bills of Exchange, or Notes carrying Interest, should receive Interest out of their Estate, for the principal Sums which were owing at the Time the Commission issued, from the Day of the issuing till they should receive full Satisfaction, before any Surplus should be conveyed to the said Bankrupts; and that the major Part of the Commissioners named in the said Commission should take an Account of the Estate of the said Bankrupts in the Hands of the Assignees, and compute Interest on the principal Sums which were due at the Time of the Commission issuing, on Bonds, Contracts, Bills of Exchange, and Notes carrying Interest, according to the Rate of Interest expressed; and if no Rate of Interest expressed, then at *5 per Cent.*; but no Interest to be calculated on Bonds beyond the Penalties: and

(*a*) *Ex parte Cocks*, *ante*, 317.

that

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that the said Creditors should be paid such Interest as should be found due to them, out of the Surplus of the said Bankrupts' Estate and Effects; and the Residue of such Surplus should be paid by the said Assignees to the said Bankrupts, according to their Rights and Interests therein.

The Petition further stated, that the Bankrupts were indebted to the Petitioners on eight Bills of Exchange, accepted by them, the Amounts and Dates of which were specified; that the Assignees had a Surplus; and that under the before-mentioned Order, the Petitioners were entitled to be paid Interest on the said Bills, inasmuch as the Bankrupts had been in the Habit of paying Interest upon the Bills when overdue; thereby raising a Contract for Payment of Interest, from the Habit of Dealing. That Ground however not being established in Evidence, was abandoned at the Hearing; and this Petition, therefore, was argued upon the same Principle as the former (*a*).

Mr. *Hart* and Mr. *Cullen*, in Support of the Petition.

Sir *Samuel Romilly* and Mr. *Cooke contra.*

The Lord CHANCELLOR.

The special Circumstance distinguishing this Petition from former Applications of the Kind, namely that the Bankrupts had been in the Habit of paying Interest upon such Notes; and therefore that a Contract to pay Interest was to be inferred from such Habit, is now abandoned: there is no such Specialty here. I am however ready to say, that if from such Habit the Contract could be inferred, the Debt would carry Interest. My Order

(*a*) *Ex parte Cocks, ante*, 317.

directed

directed the Payment of Interest upon Debts carrying Interest; with respect to Bonds, not beyond the Penalty; with respect to Notes bearing Interest upon the Face of them, Interest at the Amount specified; and where the Amount of Interest was not specified, Interest at 5 *per Cent.*: meaning in the latter Case, not that Interest should be given in those Cases where the Amount of Interest was not specified; but where there was a Contract for Interest, and the Rate of that Interest was not specified, that then the Calculation should be at the Rate of 5 *per Cent.*

The Difficulty which I have always felt upon these Applications is, how the Court was ever induced to give Interest in any Case. When a Commission issues, Interest stops at the Date of the Commission. Up to the Date of the Commission the Creditor has a Right to prove: but for Nothing beyond it. Lord *Hardwicke*'s Rule is, that in the Case of a Bond, where there is a Surplus, the Allowance of Interest shall not exceed the Amount of the Penalty. There is a Difficulty in saying upon what Principle that proceeds. The Court has been in the Habit of giving Interest beyond the Amount of the Penalty, if it has been suffered so to accumulate by the Fault of the Debtor. In the Case of a Bill for an Injunction against proceeding at Law upon a Bond, where the Bill has been dismissed, and the Injunction dissolved, the Plaintiff has been considered as having submitted to pay the Interest thus accumulated by his own Act, even although it should exceed the Amount of the Penalty. Stretching the Equity in one Case, I do not see why they might not have extended it in the other. As to what has been said in Argument, that promissory Notes carry Interest by Force of the Contract, Lord *Hardwicke* was an excellent common Lawyer, and he has over and over again said, that Damages

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Damages are given beyond the Amount of Bills of Exchange and promissory Notes, not by Force of the Contract, but in Respect of a Breach of it. Even since the Introduction of that Practice, the Court has proceeded on the old Rule in Bankruptcy, and never has gone further than in the Cases which have been referred to (*a*). I will not alter the Practice in Bankruptcy; being of Opinion that Interest is payable in the Nature of Damages at Law, and not as provided for by the Contract.

Petition dismissed with Costs.

LINCOLN'S INN HALL, *August*, 1813.

Ex parte PATERSON.—In the Matter of BRYANT.

If a Creditor believing a Commission to be invalid, does not prove under it, but acting adversely, declares to the Bankrupt and his Friends, that he means to petition for a Supersedeas, and to stay the Certificate, unless his Debt be paid or satisfied, that is not such a Tampering as will operate in Bar to his Petition.

A COMMISSION of Bankrupt issued against *Bryant* as a Scrivener; *Paterson*, a Creditor to the Amount of £400 under an Award, and for the Non-payment of which he had previously to the Commission issued an Attachment, presented the present Petition, impeaching the Validity of the Commission; 1st, as being

Whether or not a Trader has ceased his Trading, does not depend upon the mere Discontinuance of it, or the Absence of any specific Acts of Trading, but whether there be an Intention to exercise or resume it; and that is a Question for a Jury. Whether or not a Person is a Trader as a Scrivener, does not depend upon his occasionally doing such Acts of Trading as Scriveners were accustomed to do, but upon an Intention generally so to get his Living.

(*a*) *Vide* the Cases, *Ex parte Cocks*, *ante*, 317, n.

concerted

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concerted and collusive; 2dly, that there was no petitioning Creditor's Debt; and 3dly, that *Bryant* was not a Scrivener within the Bankrupt Law.

This Petition was in the first Instance, met by Affidavits on the Part of the Bankrupt, the petitioning Creditor, and Assignee; stating, that previously to his presenting his Petition, *Paterson* had made Proposals to them, that if his Debt were paid or secured to him, he would not interfere with the Commission; but that if it were not, he should certainly apply to the Great Seal, to supersede the Commission and to stay the Certificate. *Paterson* filed an Affidavit, contradicting that Charge, and asserting, that the Proposals originated with the Bankrupt and his Friends.

Mr. *Hart*, Mr. *Wingfield*, and Mr. *Heald*, in Support of the Petition.

Sir *Samuel Romilly* and Mr. *Montague* for the Bankrupt.

Mr. *Leach* and Mr. *Rose* for the Assignees.

The Lord CHANCELLOR.

It is asked on the one Hand, summarily to dismiss this Petition, and on the other, to grant the Prayer of it, without any Investigation into the Truth of the Allegations contained in it. It is presented by a Creditor, who has not come in under the Commission, and who insists upon three Objections against it. First, that there is no Debt; secondly, that there has been no Trading as a Scrivener; and thirdly, that it is a concerted and collusive Commission.

The Course here taken is not to traverse these Objec-

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Ex parte PATERSON.—In the Matter of BRYANT.

tions; but to state that the Petitioner has been tampering with the Bankrupt and his Friends, as a sufficient preliminary Objection to the Hearing of the Petition: and if, upon full Examination of the Affidavits, I find that Case of Tampering not satisfactorily made out, I think it too much to conclude the Respondents by their present Defence, and not to admit them to file a short Affidavit of those Facts, upon which the Commission can be sustained.

I am not satisfied that the Charge of Tampering has been made out. The Cases which have been alluded to, have been Cases (*a*) in which the Creditor did not dispute the Validity of the Commission; on the contrary, in many of them the Creditors had proved, and the Fact was clearly established, of their Willingness to sign the Certificate, if they only had Money put into their Hands to induce them. In these Cases the Court has said, that a Petitioner under such Circumstances is not entitled to be heard. The present is a Case which requires more Consideration; viz. where a Creditor, sincerely believing that a Commission cannot be supported, and that it is an Abuse of the Great Seal: if such a Creditor says, I will be paid my Debt in full, I will not suffer such a Commission to operate against me; it is very hard to say, he shall not be heard for that Purpose. Nor is it quite clear upon these Affidavits, that there may not have been Attempts to draw Persons into Conversation, for the very Purpose of founding the Objection relied on against the present Petition. There is so much Suspicion, that I cannot act upon that Ground. I shall therefore give the Bankrupt and the Assignees an Opportunity to present Affidavits of the Debt and the Trading; trusting that, in the mean Time, the Petitioner will not take the Bankrupt in Execution.

(*a*) 6 *Ves. Jun.* 1.

The

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The Petition now came on again, upon satisfactory Affidavits as to the Debt; and as to the Trading, upon an Affidavit, stating various Instances of Money actually deposited and left with the Bankrupt, for the Purpose of being laid out upon Loans, Mortgages, Annuities, and other Securities. The Affidavit however, though it spoke generally to the Trading for many Years past, did not mention any specific Acts of Trading at a Period later than *May* 1811, two Years previous to the Bankruptcy; and none, during the Existence of the Partnership with *Paterson*. It was therefore contended, on the one Side, that even admitting him to have been at any Time a Scrivener, he had ceased to be so previous to the Bankruptcy; on the other Side, that the Trade, having been once established in Evidence, the Presumption was, that it continued to exist at the Time of the Bankruptcy; and *Heanny* v. *Birch*, *ante*, p. 356, was cited: and that the Discontinuance during the Partnership was not an absolute Cessation, but merely an Interruption of the Trading.

The Lord CHANCELLOR.

That the Bankrupt has ceased to be a Trader, does not depend upon the Fact, whether or not you can find any specific Acts of Trading; but whether or not, in Point of Intention, he had ceased to be a Trader. It is a Question for a Jury, whether there was an entire Cessation of Trading, or merely an Interruption, with an Intention of resuming it when an Opportunity should offer. Whether or not therefore, *Bryant*, during his Partnership with *Paterson*, had abandoned his Business of a Scrivener, for that of an Attorney, is a Question for a Jury. Next, as to the Trading as Scrivener. That does not depend upon the Fact, whether the Bankrupt has or has not occasionally done Acts which a Scrivener peculiarly and properly would have done; not upon what he may have done upon

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one Day, and what upon another, but upon his Intention generally to get a Living by so doing. The true Result therefore of this Petition, must be an Issue, whether *Bryant* was a Scrivener at and after the Partnership with *Paterson*.

2 Rose 27

In *ex parte Malkin*, in the Matter of *Adams, Lincoln's Inn Hall, August* 1812, a similar Question arose upon the Validity of a Commission against an Attorney as a Scrivener. The Lord *Chancellor* then said, I have heard old Lawyers say, they considered a Scrivener to be a Person who took Procuration for Employment of Money, and included all Charges for Deeds, &c. under that Procuration. I have a Notion, that if an Attorney, acting to such an Extent as to afford Evidence of a general Intention, receives Commission for laying out Money, as well as Fees for drawing and executing Conveyances, that would be a Scrivener, within the Operation of the Act, (21 *Jac.* 1. c. 19.): but I am not sure that my Notion is well founded.—An Issue was directed. *Vide Willet* v. *Chambers, Cowper* Rep. 814. *Ex parte Wilson*, 1 *Atk.* 218. *Ex parte Burchall*, 1 *Atk.* 141. *Bird* v. *Mayor, Lord Ray.* 851. *Hamson* v. *Harrison*, 2 *Esp.* N. P. Cases, 555. In the Matter of *Warren*, 2 *Scho.* and *Le Froy.* Rep. 414.—*Vide* "An Inquiry into the Nature of the Trading as a Scrivener," where the Cases on this Subject are collected.

Ex

LINCOLN'S INN HALL. 19th *Aug.* 1813.

Ex parte OLIVER.—In the Matter of OLIVER.

If Commissioners think that the Bankrupt has not answered satisfactorily upon his Examination, they are bound to commit him; but he may be discharged, either upon his answering satisfactorily to them at a subsequent Time, or upon his Answer already given, being deemed satisfactory by such other Jurisdiction as he shall be brought before by Writ of *Habeas Corpus*.

THE Bankrupt *Oliver*, having been committed to *Newgate* by the Commissioners, for not answering to their Satisfaction, presented a Petition, stating generally, the Difficulties with which his Examination had been attended, from the Prejudices his Creditors had conceived against him: that the Account which he had given of the Disposal of a Sum of £400, and for which as unsatisfactory, the Commissioners had committed him, was the Truth. It prayed, that the Commissioners might be directed to proceed further in his Examination, and that he might be in the mean Time discharged out of the Custody of the Keeper of the Prison of *Newgate*.

When this Petition was first mentioned, the Lord *Chancellor* directed the Writ of *Habeas Corpus* to issue. The Writ being returned, together with the Warrant of Commitment, the latter stated the following Questions and Answers, as the unsatisfactory Account upon which the Bankrupt had been committed.

It is not sufficient that the Bankrupt answers fully, roundly, and positively; it is necessary that he should answer credibly and satisfactorily.

Upon a Question of Discharge from Commitment by Commissioners, the Lord *Chancellor* will not go out of the Return to the Writ of *Habeas Corpus*, into the Conduct of the Bankrupt under the Bankruptcy, or into any Examination other than that stated in the Return to the Writ.

The Bankrupt must answer every lawful Question; and although he is not bound to criminate himself, yet, if he refuses to account for any Part of his Effects, his Refusal subjects him to a Commitment.

" What

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" What is the Name of the Person to whom you at a " former Meeting stated you had paid £400, of which " you paid £200, Part thereof in *October*, and £200, " other Part thereof, after your Return from the Country."

" I do not know his Name."

" Where does he live, or where is he to be found?"

" I cannot tell."

" Have you any of the Notes, which on a former Day " you stated you received from the Person to whom you " paid the Money?"

" No, I have not."

" Can you give any other or further Explanation re- " specting the Sum of £400, than was given by you on " the 28th Day of *May* last, and has been given by you " this Day?

" No, except that since the last Meeting, I have called " at the *Plough* and described the Person, and requested " that if he should come again, to follow him Home, that " I might ascertain who he was and his Place of Resi- " dence, and I would pay them for it."

" On the 28th of *May* the following Question was put " to you, to which you gave the following Answer.— " Question—What is the Name of the Person to whom " you at a former Meeting stated you had paid £400, of " which you paid £200, Part thereof in *October*, and " £200, other Part thereof, after you returned from the " Country?"

" Answer.

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" Answer.—I do not know his Name. I have seen him " twice since I paid the last £200. He is a tall Man, " wears Black, and uses Spectacles. I met him by Ap- " pointment at the Corner of *Newgate-street*.—The first " Time I saw him, he followed me from a House in the " Neighbourhood of *Ludgate-Hill:* he followed me Home, " and spoke to me late in the Evening in my Coffee- " room at *Dolly*'s; he stated, that he knew the Lady " whom he had seen with me, and that he had seen me " before, and suspecting I was the Person who kept " *Dolly*'s, he followed me; he whispered me, and said, " unless I made him a handsome Compliment, he would " give Information to the Husband. He first asked £500, " or he would expose me to my Family, and cause an " Action to be brought against me. I told him I would " meet him the next Evening, at the *Plough* at *Smith-* " *field*; the Place was named by him. I met him the " next Evening, but did not in the mean Time consult " any one on the Subject; he then told me he must have " the Money. I replied the Sum was an enormous one, " and such as I could not raise. He eventually agreed to " take £400; £200 to be paid in a Fortnight from that " Time (which was in *September*), and £200 more as " soon as I could before *Christmas*. I took no Receipt, " nor any Memorandum. I paid him in Bank-notes; one " Note was for £100, which I received from Mr. *Gard-* " *ner*. I was to meet the Person, and did meet him " about a Fortnight afterwards at the *Plough*, and paid " him the first £200. He applied to me several Times " by Note, without any Name, for Payment of the re- " maining £200. The Notes were sent by a Boy; they " were all sent by the same Boy. I do not know the " Boy's Name, but I should know him if I saw him: he " did not wait for my Answer, but I went to the Person " at the *Plough*, where the Note stated he was waiting " for me."

" Are

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" Are you prepared to give any further Explanation re-
" specting this £400?"

" No, I have nothing else."

" The Charge this Man made against you was, for hav-
" ing been with the Wife of another Man?"

" Yes, the Husband was in an inferior Situation in
" Life."

" Had the Man who made the Charge, an Opportunity
" of knowing that the Charge he made against you was
" true in Fact?"

" I think he had; because on a former Occasion, the
" Maid Servant of the House had told me, that when the
" Woman alluded to went out, a Man followed her,
" which I suspected to be the Person."

" Can you state any Person to whom you related the
" Transaction before your Bankruptcy?

" I cannot."

" Did you name it to the Woman herself?"

" I did not."

The Writ and Return having been read, Sir *Samuel Romilly* and Mr. *Cullen* were heard on Behalf of the Bankrupt, upon a Motion for his Discharge; and Mr. *Leach* and Mr. *Montague* in Support of the Commitment.

The Lord CHANCELLOR.

The Case presents an Application of rather an unusual Nature

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Nature in Bankruptcy. Although the Writ of *Habeas Corpus* is demandable of the Great Seal as a Matter of Right; yet in Point of Fact, and excepting in Causes in this Court, for the Purpose of changing the Custody of a Prisoner from one Place of Confinement to another, the *Chancellor* has but rarely been applied to. On this Occasion, the Application was made to me upon a Petition, praying, that I would be pleased to direct the Commissioners to appoint an early Day for the Examination of the Petitioner, and that in the mean Time he might be discharged out of Custody. I thought, that for the Object of that Petition, I was fully informed of the Extent the Examination of the Petitioner had gone to; and I directed the Writ of *Habeas Corpus* to issue. Upon seeing the Return which has been made to that Writ, I am of Opinion, that so much of the Prayer of the Petition, as requires the Commissioners to proceed farther in the Examination of the Petitioner, ought to be complied with; whether or not, during that further Enquiry, he ought in the mean Time to be discharged, I shall withhold any Direction till I shall have given the Subject a little more Consideration. I am the more anxious to give this Subject a little more Consideration, because I am left almost entirely to form my Judgment upon the Nature of this Jurisdiction, chiefly from my own Decisions in the Cases to which I have been referred (*a*). The Question of Jurisdiction is one of great Anxiety and Difficulty, with Reference both to the Intention of the Legislature, to the Duty of the Commissioners, and of this Court; to those who are subject to this Jurisdiction, and those who are to exercise it.

The Language in which the Legislature has thrown this Duty on the Commissioners, and from which they

(*a*) *Vide* Note at the End of the Case.

ought

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ought to be relieved, if the Difficulty is as great as it seems to me to be, is as follows:

"It (*a*) shall and may be lawful to and for the said "Commissioners, or the major Part of them, to examine "as well by Word of Mouth as on Interrogatories in "Writing, all and every Person or Persons, against whom "any Commission of Bankrupt is or shall be awarded, "touching all Matters relating to the Trade, Dealings, "Estate and Effects of all and every such Bankrupt and "Bankrupts; and also to examine in the Manner afore-"said, all and every other Person duly summoned before, "or present at, any Meeting of the said Commissioners, "or the major Part of them, touching all Matters relat-"ing to the Person, Trade, Dealings, Estate and Effects "of all and every such Bankrupt and Bankrupts, and "any Act or Acts of Bankruptcy committed by him, her, "or them; and also to take down or reduce into Writ-"ing, the Answers or verbal Examinations of every "such Bankrupt, or other Person, had or taken before "them as aforesaid; which Examination, so taken down "or reduced into Writing, the Party shall and is hereby "required to sign and subscribe; and in Case any such "Bankrupt or Bankrupts, or other Person or Persons, "shall refuse to answer, or shall not fully answer to the "Satisfaction of the Commissioners, or the major Part of "them, all lawful Questions put to him, her, or them, by "the said Commissioners, or the major Part of them, as "well by Word of Mouth as by Interrogatories in Writ-"ing, or shall refuse to sign and subscribe his, her, or "their Examination so taken down or reduced into "Writing as aforesaid (not having a reasonable Objection "either to the Wording thereof or otherwise, to be al-"lowed by the said Commissioners), it shall and may be "lawful to and for the said Commissioners, or the major

(*a*) Stat. 5 *Geo.* II. c. 30. s. 16.

"Part

" Part of them, by Warrants under their Hands and Seals, " to commit him, her, or them to such Prison, as the said " Commissioners, or the major Part of them, shall think " fit, there to remain without Bail or Mainprize, until " such Time as such Person or Persons shall submit him, " her, or themselves to the said Commissioners, and full " Answer make to the Satisfaction of the said Com- " missioners to all such Questions as shall be put to him, " her, or them as aforesaid, and sign and subscribe such " Examination as aforesaid, according to the true Intent " and Meaning of this Act."

Under the Provisions of this Clause, therefore, and as the Law now is, the Duty of the Commissioners is difficult; if they conscientiously think that the Bankrupt has not answered satisfactorily, they are bound to commit him, subject to his Discharge, not upon his answering to their Satisfaction, but upon his Answer being deemed satisfactory by some other Jurisdiction. When this Case was first mentioned, I refreshed my Memory by a Recurrence to all the Authorities upon the Subject, and the Result which I have ascertained, as the Test by which the Commitment can or cannot be sustained, is, whether or not the Question is answered to the Satisfaction of the Judge, before whom the Validity of the Commitment is agitated, upon the Return of the *Habeas Corpus*.

The Cases which decided that, if the Bankrupt will answer fully, roundly, and positively, his Answer must be taken as sufficient, are now completely exploded: later Cases have displaced that Doctrine. As the Law now is, the Question is, whether in the first Instance the Answer is such as the Commissioners can believe; and in the second Instance, whether it is such, as the Court to which the Application for the Discharge is made, can believe. If that be the Question for the Judge, it is impossible for him to form his Judgment upon any Thing but on the Return

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Return to the Writ, and therefore it cannot in the least operate upon my judicial Consideration, what was the Conduct of this Man on any other Day, or what have been his Answers to any other Questions than those which are thus presented to my Attention.

The Duty of the Commissioners is very shortly stated; the Bankrupt must answer every lawful Question; and in that there is great Difficulty. If a Sum of Money is unaccounted for, and the Bankrupt says, I will not tell what is become of it, he must thereby subject himself to the Imputation of not being able satisfactorily to account, and to the Consequences of that Imputation. He is not bound to answer Questions criminating himself, but if he refuses to give that Account, his Answer is unsatisfactory within the Language of the Act, and he exposes himself to the Consequences of it. That, however, is not the Case here. The Bankrupt here does not refuse to account for this Money; he does answer: he says he gave the £400 to silence a Person whom he thought would make a Discovery, which he was most materially and feelingly interested to prevent. I think upon these Points in his Examination the Commissioners have not pressed him far enough; they should have examined with more Minuteness and Particularity of Enquiry into all the Circumstances of his Statement. I think they were not only authorized, but bound to put every Question, even to ascertaining who the Woman was, for the Purpose of correcting their Unbelief, or of completely confirming them in it. In this View of the Case, all I shall do at present is, to recommend the Commissioners to proceed farther in this Examination; whether or not the Bankrupt shall be discharged in the mean Time, I shall defer the Mention of till to-morrow.

20th Aug. 1813.

The Lord CHANCELLOR.

Confining my Attention to the Examination which produced

duced this Commitment, I cannot say that the Answers of the Bankrupt are so satisfactory that I ought to discharge him; let him therefore be remanded.

In *Pedley's* Case, *Leach* 365, per Lord *Mansfield*, "If a Bankrupt "swear fully and roundly, and the "Commissioners have every Reason to believe that what he "swears is not true, yet they must "take it to be satisfactory, provided that it would be satisfactory in Case it was true. In the "present Case every Circumstance "tends to shew, that the Bankrupt has sworn falsely, but "he has answered fully; and the "Commissioners cannot commit "him for false Swearing: he must "therefore be discharged." That Doctrine, however, has since been held to be erroneous. 1st. By the Court of *King's Bench*, in *ex parte Nowlan*, 6 T. R. 118, in which Case, per Lord *Kenyon*, C. J. "There are no technical Rules by "which Cases of this Kind are determined, but the Question in "each particular Case is, whether "the Answers given by the Bankrupt, be or be not sufficient to "satisfy the Mind of any reasonable Person." *Ashurst*, J. "It "would be a ridiculous Ceremony "for the Commissioners to go "through in examining a Bankrupt, if they were bound to give "Credit to his Account, however "improbable or absurd it might "be, merely because he has the "Effrontery to swear it." *Grose*, J. and *Lawrence*, J. concurred.—2dly, By Lord *Eldon*, C. in *Ex parte Nowlan*, 11 *Ves.* Jun. 511, and in *Taylor's* Case, 8 *Ves.* 328. "As to the Word, 'full,' it must "be full in this Sense, that it "must be reasonably satisfactory "to the Mind that is to decide." Per Lord *Eldon*, C. *ibid.*

It is not a Ground for Discharge, that the Creditors can derive no Benefit from the Examination, *Nowlan's* Case, 11 *Ves.* 516.

As to the Legality of the Commitment upon Questions which, if answered by the Bankrupt, would criminate himself, *ibid.* 514.

The Commissioners have but a special Authority to commit. *Bracy's* Case, 1 *Salk.* 348. And if they exceed it they are liable to an Action of Trespass and false Imprisonment. *Miller* v. *Seare*, 2 *Blacks.* Rep. 1141. The Commitment must pursue the Words of the Act of Parliament, and the Courts have been strict in their Construction of it. *Nathan's* Case, 2 *Strange* 880. Commitments by Commissioners of a Bankrupt till he conformed to their Authority, (*Bracy's* Case)—till discharged by due Course of Law, 2 *Lord Ray.* 851. 1 *Salk.* 351—until he should make a full Disclosure, or be otherwise delivered by due Course of Law, 2 *Strange*, 880—until he should full Answer make to all such Questions as should be put to him, 2 *Blacks.* Rep. 831. 3 *Wil.* R. 420. held to be bad. *Vide Perrot's* Case, *Burr.* 1122.

Ex

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Ex parte ROWLANDSON and OTHERS.—In the Matter of JOSEPH ANCELL; and also in the Matter of GEORGE and JOSEPH ANCELL.

Joint Creditors under a Bankruptcy are bound by a *bonâ fide* Dissolution of the Partnership, and an Assignment of the Partnership Estate and Effects, to one of the Partners. But where, after a Dissolution and such an Assignment, a Bill was filed by the retiring Partner against the other, alleging Fraud in the Non-performance of the Articles of Dissolution, and praying an Injunction and a Receiver, which were ordered: held, upon a subsequent Bankruptcy, that such Interference of the Court restored the Property to its original Character, as joint Property; unless the Plaintiff in Equity, had by his Conduct between the Time of his obtaining the Injunction and the Bankruptey, rendered nugatory the Effect of such Interference. And upon that an Enquiry directed.

FOR several Years previous to the Month of *November* 1810, the Bankrupts carried on the Business of Calico Printers in Co-partnership; an Agreement was entered into, bearing Date the 23d of *November* 1810, whereby they agreed to dissolve Partnership from that Day, and that the Business should from thenceforth be carried on by *Joseph Ancell* alone, to and by whom all Debts to and from the Partnership should be received and paid; and that the Lease of the Factory and Premises at *Wallington*, together with all the Stock in Trade of every Denomination, should be taken by *Joseph Ancell* at a fair Valuation, to be made by two indifferent Persons, one to be chosen by each Party. Mutual Bonds of Arbitration were entered into, dated 10th *December* 1810,

Sales, &c. having taken Place under a separate Commission, the Court, in Preference to superseding it, yet in Order to give Effect to a subsequent joint one, directed it to be impounded in the Office of the Secretary of Bankrupts.

and

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Ex parte ROWLANDSON and Others.—In the Matter of JOSEPH ANCELL; and also in the Matter of GEORGE and JOSEPH ANCELL.

and an Award made, bearing Date the 5th of *January* 1811, whereby the Arbitrators found and awarded the Amount of the Stock, Implements, and Utensils in Trade, with the Term, Estate, and Interest of the said Parties, and in the Lease of the said Factory and Premises at *Wallington*, to be £4364 : 1*s* : 0*d*; and they awarded, that *Joseph Ancell* should, on or before the 5th Day of *February*, give to the said *George Ancell* three several Bills of Exchange for the Sum of £2182 : 0*s* : 6*d*. being one equal Moiety or half Part of the said Valuation; and that *George* should execute a proper legal Assignment of all his Estate and Interest in the leasehold Premises and Partnership Effects.

In Pursuance of the said Award, *George Ancell* gave up the Whole of the Partnership Stock and Effects, together with the Possession of the Premises, to *Joseph Ancell*; and he drew three Bills of Exchange upon *Joseph* for the Amount of the Money awarded to be paid to him; but *Joseph* refused to accept them. In Consequence of such Refusal, *George Ancell*, on the 3d of *July* 1811, filed a Bill in *Chancery*, stating the above Circumstances, and praying an Account of the Partnership Effects, an Injunction, and a Receiver.

By an Order made in the Cause on the 29th of *July*, 1811, *Joseph Ancell* was restrained by Injunction from getting in or disposing of the Partnership Debts, Stock in Trade, or Effects; and it was referred to the Master to appoint a proper Person for a Receiver.

A Commission of Bankrupt issued against *Joseph* on the 20th of *January* 1812; and on the 25th of *June*, 1812, a joint Commission of Bankrupt issued against *George Ancell* and *Joseph Ancell*. The Petitioners were joint Creditors of *George Ancell* and *Joseph Ancell*, and insisted,

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insisted, on Behalf of themselves and the Rest of the joint Creditors, that the Whole of the Property belonging to the Partnership at its Dissolution still continued to be joint Property, and prayed a Distribution of it accordingly; alleging, that at the Time of the Dissolution the Concern was embarrassed and insolvent. They also prayed, that the separate Commission should be superseded; offering to confirm all Sales which had taken Place under it.

Sir *Samuel Romilly*, and Mr. *Cooke*, in Support of the Petition.

Mr. *Bell contra*, cited *Ex parte Ruffin*, 6 *Ves.* Jr. 119 (*a*). *Ex parte Williams*, 11 *Ves.* Jr. 3 (*b*).

The Lord CHANCELLOR.

George and *Joseph Ancell* were Partners. On the 23d of *November*, 1810, they consented to a Dissolu-

(*a*) *Ex parte* RUFFIN.

A fair Dissolution of Partnership between two; one retiring and assigning the Partnership Property to the other, and taking a Bond for the Value, and a Covenant of Indemnity against the Debts; the other continued the Trade separately a Year and a Half; and then became a Bankrupt.

The Lord *Chancellor*

Was of Opinion, the joint Creditors had no Equity attaching upon Partnership Effects remaining in Specie. "The Principle," says his Lordship, "has been that "if the Court should say, that "what has ever been joint or se- "parate Property shall always re- "main so, the Consequence would "be, that no Partnership could "ever arrange their Affairs. There- "fore a *bonâ fide* Transmutation "of the Property is understood to "be the Act of Men acting fairly, "winding up the Concern; and "binds the Creditors; and there- "fore the Court always lets the "Arrangement be as they stand, "not at the Time of the Com- "mission, but of the Act of Bank- "ruptcy."

(*a*) *Ex parte* WILLIAMS.

Upon a Dissolution of Partnership, followed by Bankruptcy, the Right of joint Creditors against joint Property remaining in Specie, depends upon the *bonâ fides*.

See also to the same Effect *Ex parte Fell*, 10 *Ves.* Jr. 347.

tion;

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tion; the Business from that Day to be carried on by *Joseph* alone, and the joint Property, except as to some Particulars, assigned to him. Possession was given to *Joseph*, who refused to accept and give the Bills of Exchange, directed to be given in Pursuance of the Award, and according to the Valuation of the Arbitrators; and he never, in Fact, paid any Consideration for the Assignment of the Partnership Property to him. Under these Circumstances, if the Case had stood so between *George* and *Joseph*, *George* would have had a Lien upon the Partnership Property, as against *Joseph*; but the Question is different as against the Creditors of *Joseph*: and as against them, I think it sufficient to say, he would not have had such a Lien. If one Partner puts another into the sole Possession of the Partnership Estate and Effects, and leaves them in his sole Order and Disposition, giving him Title under an Instrument upon the Face of it giving Title, it would be difficult to insist, that he would have a Lien upon that Property, for the Consideration Money, against the separate Creditors of the other; considering, that he had by Title, and by his own Act, left this Property in the sole Order and Disposition of the other. Previous to the Dissolution, the joint Creditors had established no Lien on this Property; they could only sue and take out Execution, either jointly or separately, against the joint Effects or separate Effects of their Debtors: but till they had actually matured their Process into an Execution, they had no Means of specifically attaching the Partnership Effects, and could only work out their Equity through the Partner himself.

In *July* 1811, *George* filed his Bill in this Court, insisting that the Assignment was fraudulent as against him, and praying as has been stated. The Court ordered an Injunction and a Receiver; thereby taking the Management of this Property into its own Hands. *George* had

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then a Right to say, that *Joseph* was thereby divested of his Possession of and Jurisdiction over this Property; and from that Time therefore, unless it can be clearly shewn, that *George* has by his subsequent Conduct altered the Situation of Things arising out of the Bill in this Court, and has assented to *Joseph*'s having the Ownership of and Control over the Property: the Property was not, at the Time of the Bankruptcy, in the Order and Disposal of the Bankrupt; and had not been in Equity assigned to him. What Circumstances of Conduct, altering this Situation of the Parties, may have taken Place between the granting of the Injunction and the Bankruptcy, I do not know; and that must be, if demanded, a Matter of Inquiry: but, in the mean Time, let the Property remain under the qualified Order of the Assignees of the separate Estate.

I am not now breaking in upon *Ex parte Ruffin*; the Circumstances are different.

As to superseding the separate Commission, after what has taken Place under it, all that I shall do in it, is to direct the separate Commission and Proceedings to be brought into the Secretary of Bankrupt's Office, and there to be impounded (*a*).

(*a*) *Vide post*, 431. N. and 1 *Ves.* and *Beames*, 308.

Ex

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Ex parte FARLOW.

Under a separate Commission against one of a Partnership, and the usual Order for keeping distinct Accounts, the joint Estate paid eighteen Shillings in the Pound, and the separate Estate two Shillings: held that the Bankrupt was entitled to no Allowance; the Payment to the joint Creditors being strictly not a Payment under the Bankruptcy, but under the Order, in the Nature of a Decree upon a Bill for an Account in Equity.

A SEPARATE Commission issued against the Bankrupt, one of a Partnership; the usual Order had been obtained for keeping distinct Accounts of the joint and the separate Estates: the Estates paid the joint Creditors eighteen Shillings in the Pound, and the separate Creditors two Shillings in the Pound. This was a Petition by the Bankrupt, praying that the Assignees might be directed to pay him the Allowance given by the Statute (*a*) to Bankrupts, whose Estates pay their Creditors fifteen Shillings in the Pound.

Mr. *Johnson*, in Support of the Petition, contended, that the Statute had not in Contemplation any Distinction of joint or separate Estate, but merely the general Extent of the Bankrupt's Solvency.

(*a*) By Stat. 5 Geo. II. c. 30. s. 7, every Bankrupt who shall conform, shall be allowed £5 *per Cent.* out of the neat Produce of all the Estate, in Case the neat Produce shall be sufficient to pay the Creditors who have proved, ten Shillings in the Pound, and so as the said £5 *per Cent.* shall not exceed £200; £7 : 10*s.* *per Cent*, not exceeding £250, if the Estate pays twelve Shillings and Sixpence in the Pound; £10 *per Cent.*, not exceeding £300, if the Estate pays fifteen Shillings in the Pound. The Cases upon this Part of the Statute are *Ex parte Grier*, 1 *Atk.* 208. *Ex parte Gregg*, 6 *Ves.* 238. *Ex parte Trop. Ex parte Calcot. Ex parte Stiles* and *Pickart*, 1 *Atk.* 208, 209. *Groome* v. *Potts*, 6 T. R. 548. *Russel v. Russel*, 1 *Bro.* 269. *Ex parte Morris*, 3 *Bro.* 79. *Ex parte Bate*, 1 *Bro.* 453.

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Mr. *Cullen*, for the Assignees, had no Wish to oppose; but, as in Duty to the Creditors, resisted the Application.

The Lord CHANCELLOR.

The old Course, in the Case of a separate Commission against one Member of a Partnership, was, that the joint Property could not be administered in the Bankruptcy; and therefore the joint Creditors were driven to their Bill in Equity, to ascertain what was to be paid to the separate Creditors: and nothing went, in the Course of Distribution, as separate Estate, but what was thus distinguished from the joint Estate. The Order for keeping distinct Accounts in Bankruptcy has superseded the Necessity of a Bill; but that is a mere Mode of Arrangement, which cannot give the Bankrupt other Privileges than he would have been entitled to, if his joint Property had been distributed under the Direction of a Court of Equity.

Petition dismissed.

Ex parte MASON and OTHERS; *Ex parte* RAWSON and OTHERS (*a*).—

In the Matter of HENRY SHERRINGTON and GEORGE COOPER;
In the Matter of HENRY SHERRINGTON, GEORGE COOPER, LEONARD COOPER, and JOHN YOUNG;
In the Matter of LEONARD COOPER;
And
In the Matter of JOHN YOUNG.

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THIS was the joint Petition of *Mason* and others, the Assignees under the Commission against *Henry Sherrington* and *George Cooper*; and of *Rawson* and others, the Assignees under the Commission against *Henry Sherrington*, *George Cooper*, *Leonard Cooper*, and *John Young*: it prayed a Supersedeas of the Commission against *Leonard Cooper*, and of the Commission against *John Young*, with Costs to be paid by the petitioning Creditor; and that if, under the Circumstances, his Lordship should deem it necessary also to supersede the Commission against *Henry Sherrington* and *George Cooper*, then that an Arrangement might be made, to prevent

Although a second Commission, where a former one is in Operation against any of the same Parties, is void; yet where the Convenience of administering a Partnership Fund requires it, and it can be done without Prejudice to Transactions which have taken Place under the first Commission, the Court will so dispose of the first Commission, as to prevent its being an Impediment to the Prosecution or Validity of the second. In this, a Case of four co-existent Commissions against a Partnership, and the Individuals of it, a very special Order was made; giving Validity and Effect to that, under which the Affairs of the Bankrupts could be most conveniently administered.

(*a*) 1 *Ves.* and *Beames*, 160.

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prevent the Impeachment of the Proceedings had under it: (viz. certain Sales, Receipts, and Actions; and, more particularly, a Judgment and Execution, under which one *James Wright* had been taken in Execution, at the Suit of the Assignees under the Commission against *Henry Sherrington* and *George Cooper*); and also to secure to the said Assignees their Costs and Expences: and that a Dividend might be forthwith made by them, under the Direction of the Commissioners acting under their Commission, if that should not be superseded; and if it should, then under the Direction of the Commissioners against the four.

The Petition stated the respective Dates of the several Commissions; viz that against the two, on the 21st of *February*, 1811; that against the four, on the 14th of *March*, 1811; that against *Leonard Cooper*, on the 29th of *March*, 1811, but he was not declared a Bankrupt; that against *John Young*, on the 24th of *April*, 1811.

That previously to the issuing of the two last mentioned separate Commissions, Notice in Writing was given to the petitioning Creditor and his Solicitor, (who were the same in both), of the Existence of the joint Commission against the four. They nevertheless proceeded to take out the two separate Commissions; alleging, that the Commission against the four was void in Law, on the Ground of the Existence of the prior Commission against the two, under which they were uncertificated.

That, in Consequence thereof, *Rawson* and his Coassignees, on the 27th of *April*, 1811, preferred a Petition to supersede the two separate Commissions, and the Commission against the two.

That

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That the petitioning Creditor under the two last separate Commissions, also, on the 7th Day of *August*, 1811, (*Rawson*'s Petition not having been advanced to a Hearing, and then remaining unheard), preferred their Petition to supersede the Commission against the four.

It then stated an Order made upon the Hearing of all the Petitions, on the 17th Day of *August*, 1811, whereby the Commissioners under the Commission against the four, were directed to certify what Proceedings had taken Place, and what Sales had been made, and Expences incurred, under the Commission against the two: and it was ordered, that all further Proceedings under the joint Commission against the two, and also under the two separate Commissions, should be stayed, save where the Commissioners under the four should direct the same; then the Assignees of the four should use the Name of the Assignees of the Two: and that the Proceedings under the joint Commission against the two should not be produced for any Purpose whatsoever, without the Consent of the Commissioners under the Commission against the four.

The Commissioners, in their Certificate, stated the Particulars of several Sales made and Conveyances executed, under the Commission against the two, and several Actions of Law, in many of which Verdicts had been obtained, and the Judgments satisfied: that a Person of the name of *Wright* had been charged in Execution, in an Action brought by the Assignees under the Commission against the two, and so remained till he took the Benefit of an Insolvent Act: that the same Person had also been committed by the Commissioners under the Commission against the two, for not answering to their Satisfaction: that he had threatened, in the Event of the Commission being superseded, to bring an Action against them and the Assignees. It stated an Agreement for the Sale and Purchase of the Bankrupt's Premises,

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Premises, but which the Purchaser, who was the Solicitor to the two separate Commissions, refused to perform; first, unless the Commission against the two was superseded; secondly, unless his Bill of Costs under the two distinct Commissions was paid. That the Assignees under the Commission against the two had then a Sum of £2800 in their Hands, which they were desirous of dividing. The Petition concluded with a Prayer, to the Effect already stated.

Mr. *Hart* and Mr. *Wear* for the Assignees of the four.

Sir *Samuel Romilly* and Mr. *Heald* for the Assignees of the two.

Mr. *Cullen* and Mr. *Bell* for the Assignees under the two separate Commissions.

The Lord CHANCELLOR.

Although, strictly speaking, a second Commission, where a first Commission has issued and is in Prosecution against the same Person, is void at Law, yet it has been the daily Practice of this Court, long before I came into it, if it could be done with Justice to Creditors and Purchasers, and those who had been concerned with the first Commission, to give Effect to the second by Arrangement here: and the Difficulty in this Case has arisen more from the Circumstance of so much having been done under the first Commission, than from its Validity at Law. Lord *Hardwicke* contrived to sustain joint and separate Commissions at the same Time, and in that Respect it may be said that he went a great Deal too far, unless he was prepared to go further, and to prevent, by the Arrangement of Orders and Injunctions, the Mischief that might result from their conflicting Operations. After I came into this Court, a different Practice was introduced: when, for

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for Example, there was a Partnership of five, including a Partnership of four, a Partnership of three, and a Partnership of two; and distinct Commissions were taken out against all these Partners, and the Individuals of them; the Court superseded all, except the joint Commission against the five; ordering distinct Accounts to be kept of the several Firms, and also distinct Accounts of the several Estates of the individual Partners. Adopting that as a Mode of administering the Estates of the Bankrupt, far less inconvenient and expensive than by sustaining the distinct Commissions, and thereby giving Occasion for the (in many Instances almost impossible and always difficult) Co-operation of their respective Assignees.

If this, therefore, had been the Case of a subsequent Commission against all the Partners, unimpeached by any but the legal Objection of an existing prior Commission against some of them, my Course would have been obvious from the Example of my Predecessors in the Practice I have stated: duly attending, however, to what had been done under the Commission sought to be superseded. I regret, therefore, that no Application was made to accelerate the Hearing of the Petition of the Assignees of the four, because if the Application had been made upon the issuing of their Commission, or previously to so much having been done under that against the two, if the Commission against the four had been in other Respects a valid Commission, it would have been of Course to have superseded the other. Under the present Circumstances however, sustaining the Commission against the four as the operative Commission, I will so word my Order as to prevent any Embarrassment, from the Co-existence of the Commission against the two, which it is not my Intention to supersede.

The following Order was made.

Let

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Let the several Sales made under the Commission against *Henry Sherrington* and *George Cooper*, to *George Bolton*, *Hugh Jones*, *John Swainson*, *Richard Newsham*, and *Matilda Gilpin* respectively, be confirmed and carried into Execution by the Assignees under the said Commission.

Let the separate Commission against *Leonard Cooper* be superseded.

Let the separate Commission against *John Young* be also superseded.

Let these be superseded at the Expence of *Thomas Buxton*, the petitioning Creditor, to whom Notice was previously given, of the issuing of the joint Commission.

Let the Proofs of the joint Debts of *Henry Sherrington* and *George Cooper*, and of their separate Debts, made under the Commission against *Henry Sherrington* and *George Cooper*, be considered as having the same Effect, as if they had been made as Proofs of joint or separate Debts respectively of the said *Henry Sherrington* and *George Cooper*, or of *Henry Sherrington*, or of *George Cooper*, (under the Directions hereinafter given, as to Proofs of Debts,) under the joint Commission against *Henry Sherrington*, *George Cooper*, *Leonard Cooper*, and *John Young*, and be received among such Proofs.

And in Case any Proofs of Debts have been made under the respective separate Commissions against *Leonard Cooper* and *John Young*, let such Proofs be, in like Manner, considered as if they had been made as Proofs of separate Debts against their separate Estates respectively, (under the same Directions hereinafter given,) and be received among the Proofs hereinafter directed under such last mentioned joint Commission.

Let

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Let the joint Creditors of *Henry Sherrington* and *George Cooper*, and the separate Creditors of *Henry Sherrington* and *George Cooper* respectively, and also the separate Creditors of *Leonard Cooper*, and of *John Young* respectively, be admitted to prove their Debts respectively under the joint Commission against *Henry Sherrington*, *George Cooper*, *Leonard Cooper*, and *John Younge*, the Dividends to be received out of the joint Estate of *Henry Sherrington* and *George Cooper*, by their joint Creditors, and the Dividends to be received out of the respective separate Estates of the said *Henry Sherrington*, *George Cooper*, *Leonard Cooper*, and *John Young*, by their respective separate Creditors.

Let distinct Accounts be kept under the Commission against *Henry Sherrington*, *George Cooper*, *Leonard Cooper*, and *John Young*, of their joint Estate and Effects, and of their respective separate Estates and Effects, and also of the joint Estate and Effects of *Henry Sherrington* and *George Cooper* in the usual Manner.

Let the Assignees under the joint Commission against *Sherrington* and *Cooper* account with the Assignees under the joint Commission against *Sherrington*, *Cooper*, *Cooper* and *Young*, for what they have possessed, having all just Allowances, and retaining or receiving all their Expences, Costs, and Charges relative to the joint Estate of *Sherrington* and *Cooper* out of that Estate, and relative to the separate Estates of *Sherrington* and *Cooper* out of such separate Estates respectively. In Case of a Deficiency of any of the said Estates to pay such Expences, Costs, and Charges relative to the same Estates, the Assignees to have them out of the other Estates. But for the Interest of the joint and separate Estates of *Sherrington* and *Cooper*, the Assignees under the joint Commission against *Sherrington* and *Cooper* are to be at Liberty, by themselves or their Solicitor, to attend upon all

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all Proceedings relating to such joint and separate Estates, at the Expence of such joint and separate Estates, as shall be had under the joint Commission against *Sherrington, Cooper, Cooper* and *Young*, including such as are directed by this Order to be had under the last mentioned joint Commission. And the Assignees of the Commission against *Sherrington* and *Cooper* are to permit their Names, as Assignees, to be used by or to join as Assignees, with the Assignees of the Commission against *Sherrington, Cooper, Cooper* and *Young*, in all Matters in which it shall be necessary in the Judgment of the Commissioners under such last mentioned Commission, that their Names should be so used, or that they should so join, being indemnified and having their Costs, Charges, and Expences paid, the same to be paid in the first Place out of the Estates to which such Matters relate.

And let the Contract of the 13th *December*, 1811, be proceeded upon, or dealt with, after this Order is made, as the Commissioners under the Commission against *Sherrington, Cooper, Cooper* and *Young* shall direct; and let the Assignees of the Commission against *Sherrington* and *Cooper*, and those of the Commission against *Sherrington, Cooper, Cooper* and *Young* respectively, do, or join in doing, such Acts, as such Commissioners shall direct for assigning the Premises to the Purchasers if the Contract is enforced, and declare that *Hugh Dewhurst* in the Petition named, is not entitled to be paid any Costs of the separate Commissions out of the Purchase Money of the said Premises. And let the Matters relative to the Machinery mentioned in the Petition be also proceeded upon after this Order, as the same Commissioners shall direct.

And let Dividends of the respective Estates be made after this Order as the same Commissioners shall direct.

Let

Let the Assignees under both the joint Commissions be paid their Costs of the Petitions, and the Proceedings had relative thereto, out of the respective joint Estates of which they were Assignees.

No Costs to any other Persons.

Continue the Directions as to the Non-production of the Proceedings under the Commission against *Sherrington* and *Cooper*, contained in the Order of the 17th *August*, 1811 (*a*).

(*a*) *Ex parte* TOBIN (*a*).
So in this, a Case of two Partners with a separate Commission against one, under which his Certificate had been brought into the Bankrupt Office for Allowance; but prior to its Allowance, a joint Commission issued against him and his Partner.

The Lord *Chancellor*.
In Order to preserve the Certificate, refused to supersede the first Commission; but to prevent its Interference with the second Commission, directed the first to be brought into the Office and there to be impounded.

(*a*) 1 *Ves.* and *Beames*, 308. s. c. *ante*, p. 420.

Ex

Ex parte BAGLEHOLE.—In the Matter of BAGLEHOLE and REDGRAVE.

THIS was an Application by a Creditor, for an Order that certain Leasehold Premises, of which he claimed to be equitable Mortgagee by Deposit of the Lease, might be sold, and that he might prove for the Residue of his Debt.

It was objected for the Assignees, that the Deposit was good for nothing, inasmuch as the Lease contained a Covenant against assigning without Licence from the Lessor; and no such Licence had been obtained.

Sir *Samuel Romilly* and Mr. *Cullen* for the Petitioner, Mr. *Leach*, Mr. *Montague*, and Mr. *Rose*, for the Assignees.

The Lord CHANCELLOR

Overruled the Objection; the Lessor may, perhaps, waive the Forfeiture, and the Petitioner has a Right, as against the Assignees, to avail himself of the Advantage which he has by the Possession of the Lease.

LINCOLN'S INN HALL, *December* 8, 1812.

Ex parte BROWN.—In the Matter of BROWN and SCOTT (*a*).

A separate Commission is superseded to give Effect to a subsequent joint one, upon the Principle of Convenience and general Advantage to the Creditors. And the prior petitioning Creditor, unless he has been acting *malâ fide*, receives all the Costs of the superseding. When a Commission is superseded, every Thing done under it falls with it. A joint and separate Creditor, who sued out the separate Commission, and proved under it, is, upon the Supersedeas, restored to his Right of Election to prove against the joint Estate. Such a Creditor has a Right to elect, out of which Estate he will be paid the Costs of the Supersedeas.

THE Petitioner being a Creditor of *Brown* and *Scott*, upon their joint and several Bond, on the 2d of *October* took out a separate Commission against *Scott*, proved his Debt, and was chosen Assignee under it. On the 8th of *October* a joint Commission issued against *Brown* and *Scott*; and under that the Petitioner tendered the Proof of his Debt, but the Commissioners rejected it. He now prayed that the rejected Proof might be admitted, or the joint Commission superseded.

There was a counter Petition, by the Assignees of the joint Commission, praying a Supersedeas of the separate Commission with Costs, and that the Proof of the Bond Debt might be carried to the joint Commission, as the Proof of a separate Debt againt *Scott*.

It was contended on the one Side, that *Brown* having sued out a separate Commission, had elected to make a separate Proof; on the other, that, if for the Purpose of Arrangement, and for the general Benefit of Creditors, the first Commission was superseded, to give Effect to the second; then that every Thing fell with it, and *Brown* was restored to his original Situation: that the first Commission being a Matter of Right, and the legal Commis-

(*a*) 1 *Ves.* and *Beames*, 60.

sion,

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sion, and to be superseded only upon the Principle mentioned, it was preposterous, in a Case of good Faith, to fix those who were deprived of their legal Right with Costs.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, and Mr. *Montague* for the Petitioner *Brown*.

Mr. *Leach* and Mr. *Cooke* for the Assignees under the second Commission.

The Lord CHANCELLOR.

I do not know any Case where a Creditor having a valid prior Commission, has been obliged to pay the Costs of superseding it; or where, on the contrary, he has not received the Costs of superseding it, unless there has been a Breach of good Faith, or Misconduct, on his Part, in counteracting those who were at the Time endeavouring to administer the Affairs of the Bankrupt without that double Expence:—there is not that in this Case.

If what the Petitioner has done is be pressed against him as an Election, he must have the full Benefit of it as such; and in that Case I cannot supersede his Commission. Where a Commission is superseded, every Thing that has been done under it falls with it. The Principle upon which the Court acts, is the general Benefit of the Creditors. If I supersede, it must be upon an Understanding that he is to prove as a joint Creditor, because otherwise I have no Right to interfere; and he must have all his Costs, whether arising out of the Commission, this Petition, or the Supersedeas.

A Question having arisen as to what Estate he should take his Costs out of:

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The Lord CHANCELLOR.

I recollect a Case where a joint and separate Creditor claimed an Election to have his Costs out of the joint or separate Estate; and I gave him his Election.

LINCOLN'S INN HALL. *Aug.* 1813.

Ex parte PEELE.—In the Matter of DODGSON.

Composition between a Debtor and his Creditors, to pay them nine Shillings in the Pound by four Instalments, with a Proviso, that in Case the Composition should not be duly paid, then that the Release should be null and void. The Debtor pays three Instalments, and becomes Bankrupt before the Time for Payment of the fourth. The Creditors are not remitted to their original Debt, but entitled to a Proof only for the Amount of the remaining Instalment.

THIS Petition stated a Deed of Composition made between the Bankrupt and his Creditors, of whom the Petitioner was one, whereby he agreed to pay them a Composition of nine Shillings in the Pound, by four Instalments, at the Times therein mentioned. The Deed contained the following Proviso.

Provided always, That in Case the said Composition of nine Shillings in the Pound on the said several and respective Debts, shall not be duly and regularly paid by the Instalments, and according to the Purport and Effect of the said promissory Notes, and the Covenants of the said *Thomas Dodgson* hereinbefore contained, then the Release hereinbefore given by the said several Creditors, Parties thereto of the second Part, shall be utterly null and void, to the End and Intent, that the said several and respective Creditors, their respective Heirs, &c. may henceforth have and take such and the like Remedies, Ways, and Means, for the Recovery of the Whole of their

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said several and respective Debts, against the said *Thomas Dodgson*, his Executors, &c. as they respectively could or might have done if these Presents had never been made.

The two first Instalments were regularly paid, but before the third became due the Bankruptcy took Place. The Petitioner had applied to prove the Remainder of his original Debt. The Commissioners refused to admit his Proof for more than the outstanding Instalment.

The present Petition was for an Order to be admitted to prove the Residue of the original Debt.

Mr. *Cooke*, in Support of the Petition, argued that the Effect of the Proviso was to restrain the Operation of the Release, unless the Instalments were all paid.

The Lord CHANCELLOR.

If there had been any Default whatever before the Bankruptcy, however small, I agree with Mr. *Cooke*, that such would be the Effect of the Proviso: but at the Bankruptcy nothing whatever was due.

Petition dismissed.

Vide ex parte Vere, in the Matter of *Palmer*, *ante*, p. 281.

Ex parte WATTS.

THIS was a Petition that a Bankrupt Assignee might be removed, and another elected in his Place.

The

Ex parte WATTS.

The Lord CHANCELLOR.

The general Order (*a*) has superseded the Necessity of such an Application to me.—Dismiss the Petition with Costs.

(*a*) General Order 8th of *March*, 1794. 2 *Cooke's* B. L. 287.

LINCOLN'S INN HALL. *August*, 1813.

Ex parte HARRIS and ANOTHER.—In the Matter of RAMSEY and ALDRICH.

A Partnership is not entitled to prove against the separate Estate of an individual Member of it, in Respect of Funds drawn by such Member out of the general Stock, unless the same have been drawn out fraudulently; that is, against the Articles of Partnership, without the Knowledge, Consent, Privity, or subsequent Approbation of his Co-partners, or to increase his private Estate.

The Conduct of the Parties in a Partnership may supersede the Stipulations of the Articles, and raise a Presumption of Assent to a different Agreement, and an Approbation of a Mode of dealing with the partnership Funds, from their Knowledge of, and Acquiescence in it.

IN this Case it had been referred to the Commissioners (*Vide ante*, p. 129.) to inquire whether a Sum of £1182, which the Assignees of the joint Estate had petitioned for Liberty to prove against the separate Estate of *Aldrich*, had been applied by *Aldrich* to his own private Use, without the Knowledge, Privity, and Approbation of *Ramsey*, and with a fraudulent View to increase his separate Estate.

The Commissioners certified in the Negative; but they stated the following Facts for the Consideration of the Court, viz. that by the Articles of Partnership it was provided,

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vided, that the Partners should draw out for their own individual Use £50 a Month, and no more; and that the Money belonging to the Concern should be lodged in the Hands of a Banker in their joint Names; but that the uniform Practice had been for *Aldrich* to lodge the Money of the Concern with his own private Money in the Hands of a Banker in his own Name; and that he had been in the Habit of paying and drawing out Money as he saw Occasion. That the Books were kept by *Ramsey*, and that *Aldrich* regularly communicated to him the Amount of the Sums received and laid out by him.

Sir *Samuel Romilly* and Mr. *Montague*, in Support of the Petition.

Mr. *Cullen, contra.*

The Lord CHANCELLOR.

The Doctrine of Lord *Hardwicke*, that if a Partner lend Money to the Partnership, or, *vice versa*, if the Partnership lend to one of the Partners, in either Case the Debt might be proved, has been long at an End. It is now quite clear, that in the Cases put, the individual Partner cannot prove in Competition with the joint Creditors, nor the Partners in Competition with the separate Creditors. I take it now to be necessary, attending to the Result of Lord *Thurlow*'s Decisions in *Lodge* against *Fendal* (*a*), and the other Cases, that, in Order to establish a Right of Proof for the joint Estate against the separate Estate, or for the separate Estate against the joint Estate, it must be made out, that the Money was taken improperly and fraudulently. In this Sense, im-

(*a*) *Ex parte* the Assignees of *Lodge* and *Fendal*, Bankrupts, 1 *Ves.* Jr. 166.—Creditors of a Partnership, which failed in two Years, allowed to come upon the separate Estate of one Partner, in Respect of Effects taken out of the Partnership by him, without the Privity of the other.

properly

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properly and fraudulently, that it was taken, against the Contract between the Parties, express or implied; or as against an individual Partner, to increase his private Estate. I have oftener than once expressed my Confirmation of that Opinion, that those Circumstances would, in a legal Sense, constitute Fraud; for if a Case occurred, in which either by Inference from the Terms, or by the express Terms of an Agreement, there was a Contract to act, or I should rather say, a Prohibition from acting in a particular Manner, and the Partner did that Act, without the Knowledge, Privity, Consent, or subsequent Approbation of his Partner, and to the Intent to increase his private Funds, that would be *primâ facie* Fraud. Suppose the simple Case of a Partnership between *A.* and *B.*, and by the Articles of Partnership it is agreed, that all the Money should be paid in their joint Names into a particular Banking-house, and they were prohibited from drawing out more than £50 a Month each: and suppose a Sum of £500 standing in the Name of both, at the End of the Month of *January*, and on the first of *February* it is drawn out by *A.*, and on the second of *February* the Bankruptcy takes Place; if it is clear that it was drawn out by *A.*, without the Privity or subsequent Approbation of *B.*, by which I mean subsequent Approbation before the Bankruptcy; because the Money was so drawn out for private Purposes, against the Provision of the Articles, the covenanted Right of the Parties; and because without the Privity or subsequent Approbation of one of them, it would be clearly a Fraud, within the Principle of Lord *Thurlow*'s Rule. Cases of this Kind however, must be decided upon their particular Circumstances; and the Conclusion of Law, as to Fraud, must depend upon the Nature of those Circumstances. This very Case presents Circumstances which require a great Deal of Consideration. All that I can collect from it is, that there was an Agreement that the Money should be paid

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paid into the Bankers in their joint Names; but that was never done. On the contrary, *Ramsey* permitted it to be paid in in the Name of *Aldrich* alone; and whatever the original Articles may have been, there can be no Doubt, that subsequent Conduct may raise a very different Contract. It is quite clear, that from the Beginning to the End of this Partnership, there was not one Shilling paid in in the Name of both; and *Aldrich* also draws, in his own Name, all the Way through. I am therefore authorized in saying, that *Ramsey* acquiesced in a Departure from the Articles of Partnership; and, by his Conduct, conceded to *Aldrich* a full Dominion over the Funds. I think this Case approaches very nearly to that of *Fendal* and *Lodge*. If *Ramsey* knowingly acquiesced in what necessarily gave to *Aldrich* the whole Control over his Property, he must abide by the Consequence of his own Conduct. Although therefore, the Money may have been taken without the Knowledge, Privity, Consent, or subsequent Approbation of *Ramsey*, yet the Facts by which *Aldrich* was so enabled to possess himself of it, were Facts within his Knowledge, Privity, Consent, and Approbation; and, therefore, the Consequence of those Facts must also be taken to have been within his Knowledge, and with his Privity, Consent, and Approbation. The Proof, therefore, cannot be admitted.

Ex

Ex parte WALKER.
Ex parte WENSLAY.— } In the Matter of FORD.

LINCOLN'S INN HALL. 18th *August*, 1813.

Where *A.* a sole Trader, *B.* and *C.* Partners, and *D.* also a sole Trader, engaged in a joint Adventure; and for a joint Purchase of Goods by them, the Vendor, with a Knowledge of their joint Interest, received in Payment a Bill drawn by *A.* on, and accepted by *B.* and *C.*: held, that on the Bankruptcy of *A.*, and of *B.* and *C.*, the Vendor was entitled to prove the Bill against both their Estates.

UPON these Petitions, one of which was by a Creditor to have a Dividend paid upon a Debt proved, and the other by the Assignees to have the Debt expunged, the Point in Dispute was, the Validity of the Proof under the following Circumstances.

William Ford, a Rope-maker, *Price* and *Cross*, Ship-brokers, and *Joseph Gilbert*, were jointly interested in the Cargo of a Ship. *William Ford* drew a Bill of Exchange for £897. : 16*s.* : 5*d.* in Favour of *Wenslay* and Co. on Messrs. *Price* and *Cross*, which the latter accepted. The Consideration of the Bill, was Goods supplied for the Outfit of the Adventure, in which the Payees knew the Parties to be jointly interested. On the Bankruptcy of *Price* and *Cross*, *Wenslay* and Co. proved the Bill against their Estate; and on the subsequent Bankruptcy of *Ford*, they also proved it against his Estate.

Mr. *Cooke*, in Support of the Petition to expunge the latter Proof, urged the Circumstance of *Wenslay* and Co. knowing that all the Parties to the Bill were jointly interested; relied upon the Cases of *Ex parte La Foret*, and *Ex parte Bonbonus* (*a*), as confirmatory of that Distinction; and insisted that they had elected.

(*a*) The Principle of the Cases cited is, "Where the "same Persons are concern- "ed in several Firms, and "issue Bills on *which the* "*Names of the respective* "*Firms stand* as Drawers, "Indorsers, or Acceptors, a "Party taking such Bill, *con-* "*ceiving them to be distinct* "*Houses of Trade*, may prove "against each Estate."— *Cooke's* B. L. 251.

Sir

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Ex parte WALKER; *Ex parte* WENSLAY.—In the Matter of FORD.

Sir *Samuel Romilly* and Mr. *Bell*, *contra*, and also in Support of the Petition to be paid the Dividend, distinguished this from the Cases cited; in those Cases some of the Partners drew upon the Firm; this was not a Draft of one upon the Firm, but one of several Partners drawing upon two other Partners, a distinct House, clearly establishing a double Security.

The Lord CHANCELLOR

Assented to the Distinction, and directed the Dividends to be paid.

LINCOLN'S INN HALL. 17th *August*, 1813.

Ex parte LANFEAR.—In the Matter of HOLLAND.

Under a separate Commission against one of Two Partners, the Bankrupt having paid twenty Shillings in the Pound to all his Creditors, obtained an Order for the Payment of the Surplus to him, and the same was accordingly paid to him. Held that his Partner was entitled to apply by Petition in the Bankruptcy, for an Account of such Surplus, and for Payment of his Proportion of it, and that the Court had Jurisdiction to make the Order required.

HOLLAND and *Lanfear* were Partners; a separate Commission issued against *Holland*, and the usual Order was obtained for keeping distinct Accounts of the joint and separate Estate. *Lanfear* died. *Holland* paid twenty Shillings in the Pound to all his Creditors; and the Surplus of the joint and separate Estate was, upon a Petition by him for that Purpose, directed to be paid, and was accordingly paid over to him.

Mr. *Cooke*, upon the Petition of the Administratrix of *Lanfear*, now applied for an Order upon *Holland*, to account

count with her for her Intestate's Interest in the Surplus of the joint Property; and that he might be directed to pay the Funds into Court.

Mr. *Leach, contra,* insisted that the Affairs of the Commission having been completely wound up and concluded, the Commission, and the Jurisdiction over the Bankrupt consequent thereon, was at an End; that for the Object of the present Application the Petitioner should file her Bill. That she had been guilty of Laches, in not appearing upon *Holland*'s Petition for the Payment of the Surplus, with which she had been regularly served (*a*).

The Lord CHANCELLOR.

Unless the Court in Bankruptcy has the Jurisdiction to make the Bankrupt Partner account for the Surplus of the joint Estate come to his Hands, the present Practice, by which the Accounts of a Partnership are taken under the separate Commission of an Individual Partner, ought to be abolished. The Partner has, as a fair Consequence of that Practice, a Right to apply by Petition in the Bankruptcy for an Account, and to be paid his Share of the Surplus of the joint Effects. If Mrs. *Lanfear* had appeared upon the former Petition of *Holland,* the Order would not have been made; but her Absence then, ought to operate no farther against her now, than as depriving her of the Costs of this Application.

Ordered that *Holland* pay the Money into Court.

(*a*) It was admitted that Mrs. *Lanfear* had been served with *Holland*'s Petition, but through some Mistake had omitted to appear.

Ex

Ex parte WILSON.—In the Matter of STUART.

THE Petitioner was a Mortgagee of certain Premises of the Bankrupt; and upon the Bankruptcy of his Mortgagor, had given the Tenant in Possession Notice to pay the Rent to him: the Tenant, however, paid the Rent to the Assignees. The Petitioner now prayed, that the mortgaged Premises might be sold, that the Proceeds, together with the Rent received by the Assignees subsequent to the Notice, might be paid to him, and that he might be at Liberty to prove for the Residue of his Debt.

Mr. *Montague*, in Support of the Petition, cited *Moss* v. *Gallimore*, *Doug.* Rep. 279—that the Court had Jurisdiction to order Assignees, as Officers of the Court, to do what Justice required.

Sir *Samuel Romilly* and Mr. *Heald*, *contra*, contended that the Petition should be dismissed with Costs; first, because the Sale of the Mortgage, Payment of the Debt out of the Proceeds of the Sale, and Proof for the Residue, was provided for by general Order (*a*); secondly, that it was a Proposition unheard of before in Law or Equity, that a Mortgagor receiving Rents, after Notice to the Tenant from the Mortgagee to pay to him, became a Trustee of those Rents, or received them for the Use of the Mortgagee.

The Lord CHANCELLOR.

Moss v. *Gallimore*, though now too long established not to be adhered to, was not approved by many Lawyers of that Day. The Tenant is by that Decision placed in

(*a*) General Order, 8th of *March*, 1794.

rather

rather an hazardous Situation. Holding under Title derived from the Person claiming the Equity of Redemption, he cannot disavow his Right to the Rent, and yet he is liable to the Distress of the Mortgagor. But that Case has never been extended; and if the Money has been actually paid to the Mortgagor, the Court has never directed him to pay it back. How can the Notice to the Tenant make him an Agent or a Trustee for you?

Petition dismissed, but without Costs.

Ex parte NIXON.—In the Matter of GOUGH.

COVENANT in a Lease, that the Lessee should at the End, or sooner Determination of the Term, leave upon the demised Premises the Hay, Straw, Fodder, Dung, &c. The Lessee became bankrupt. The Lessor presented a Petition, praying, that the Assignees might elect to take or decline the Lease, and that they might be restrained from removing from the Premises the Hay, Straw, Fodder, &c.

The Assignees declined taking the Lease, but insisted that they were entitled to remove the Articles in Question: 1st, Upon the Ground that there was not an End, or Determination of the Lease; and, 2dly, upon the Construction of the Covenant.

It was contended for the Lessor, that the Court, upon this Petition, had, as the Assignees declined to take the Lease, Jurisdiction to determine it; and that the Construction

Ex parte NIXON.—In the Matter of GOUGH.

struction of the Covenant was a Question proper for the Decision of a Court of Law upon a Case.

The Lord CHANCELLOR.

From the Language of the Statute (*a*), I have no Hesitation in saying, that I have Jurisdiction to determine a Lease between Landlord and Tenant, if it is "meet and "just in all the Circumstances of the Case," (in the first Place, looking to the Terms of the Lease itself) that it should be determined.—Thinking it right, therefore, in this Instance, to determine the Lease by the Order of the Court, take a Case upon the Construction of the Covenant.

Sir *Samuel Romilly*, and Mr. *Heald* in Support of the Petition.

Mr. *Leach* for the Assignees.

(*a*) 49 *Geo.* III. c. 121. s. 19. The Section provides, that Tenant, either under Lease or Agreement, becoming bankrupt, shall not be liable in Respect of future Rent, Covenants, or Conditions, if the Assignees accept the Lease or Agreement; and if they do not determine, whether they will or will not accept, the Lessor, or Person agreeing, may petition the Lord *Chancellor*, that the Assignees may either accept, or deliver up the Lease or Agreement, and the Possession of the Premises, who shall thereupon make such Order, as in all the Circumstances of the Case shall seem meet and just, and which shall be binding on all Parties.

Ex parte SCOTT.

This was a Petition for Assignees either to accept or reject; they craved Time to consider what would be most beneficial for the Creditors. Lord *Chancellor* allowed them ten Days for that Purpose.

Ex

Ex parte MACHEL.—In the Matter of DAWES and Co.; and in the Matter of WILLIAMS, WILSON, and Co.

LINCOLN'S INN HALL, 13th *August*, 1813.

WILLIAMS, Wilson, and Co. being indebted to *Dawes* and Co. it was agreed between them, that as a Security for the Debt, *Dawes* and Co. should be interested in a Moiety of certain Vessels, of which *Williams, Wilson*, and Co. were the Owners. The Names of the Partners in the Firm of *Dawes* and Co. were by their Agent, but, as they alleged, without their Knowledge, or any Direction on their Part, inserted in the respective Registries with those of *Williams, Wilson*, and Co.

The Petitioner had subsequently supplied the Ships in Question with various Articles for their Use, in Consequence of Orders from *Williams, Wilson*, and Co., and without knowing that *Dawes* and Co. were interested. His present Petition was, that he might be permitted to prove against the separate Estates of all the Individuals, whose Names appeared upon the Registries at the Time his Debt accrued. The Ships had been sold previously to the Bankruptcy, and the Proceeds divided between all the Parties; but *Dawes* and Co. had not in any other Respect taken Possession of, or interfered in the Management of the Ships. It was admitted, that there were no joint Effects of *Williams, Wilson*, and Co. and *Dawes* and Co.

Mr. *Hart* and Mr. *Montague* in Support of the Petition.

Sir *Samuel Romilly* and Mr. *Cullen, contra*, relied upon the Circumstance of the Names of *Dawes* and his Partners

Mortgagees of a Ship having their Names inserted in the Registry, and without which their Security could not be effectual, are liable to Creditors in Respect of Stores supplied for the Use of the Ship. The Possession of one Owner is the Possession of all. Whatever the Duty of an Agent requires him to do in the Business of his Employers, must be presumed so to be done, with their Knowledge and Direction.

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Partners being inserted in the Registers without their Consent; that all the Security they had bargained for was a Mortgage on, or an Interest in the Nature of a Mortgage on, and not an actual Property in, the Ships; that *Williams, Wilson,* and Co. retained the Control over and Management and Possession of the Vessels without the Interference of *Dawes* and Co.; and that the Credit was given to *Williams* and *Wilson* as such Owners, and without any Contract between the Petitioner and *Dawes* and Co.

The Lord CHANCELLOR.

Admitting that *Dawes* and Co. intended to have no other Interest in the Ship than as Mortgagees, they could have no Title, except by the Insertion of their Names in the Registries; and although it may be true that their Names were inserted without their personal Knowledge, yet having employed their professional Agent to see that their Security was effectual, he was bound in Duty to see that their Names were so inserted: in that Sense, therefore, it cannot be said to have been done without a Knowledge, in Respect of which they would legally be liable. It is equally difficult to say they were not in Possession: for the Vessels being in Possession of some of the Owners, must be considered as having been in the Possession of all. Putting out of the Case, therefore, the Specialty that Credit was expressly given to *Williams, Wilson,* and Co. I have no Doubt that *primâ facie* the Individuals, whose Names appear on the Registries, are liable. My Opinion therefore is, that the Petitioner is entitled to prove against all the separate Estates; but I will not refuse an Issue if it is desired.

The Issue being declined, it was ordered, that it appearing to the Court that there were no joint Effects of the two Houses, the Petitioner might prove against the respective

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respective Estates, and receive Dividends not exceeding twenty Shillings in the Pound in the Whole; first proving against those of *Williams, Wilson*, and Co. in Order to exonerate those of the Members of the Firm of *Dawes* and Co. as much as possible.

ANNETT v. CARSTAIRS.

3 *Camp.* N. P. Cases, 356.

Mason, the Owner of a Ship, employed the Plaintiff as the Master of it, and afterwards mortgaged it to the Defendants, and their Names were indorsed on the Registry. The indorsed Certificate of Registry was handed to the Plaintiff, but he had no direct Information of the Transaction, and continued to consider and correspond with *Mason* as his Owner. The Defendants never took Possession, nor received any Benefit from the Ship.—This was an Action by him for his Wages and Disbursements as Master.

Lord *Ellenborough*.

We are here to consider with whom the Plaintiff has contracted. There is express Privity of Contract between him and *Mason*: the legal Ownership of the Ship thus becomes immaterial. *Vide Jackson* v. *Vernon*, 1 *H. Black.* R. 114. *Westerdell* v. *Dale*, 7 T. R. 306. *Young* v. *Brander*, 8 *East*, 10. *Trewhella* v. *Rowe*, 11 *East*, 435. *Frazer* v. *March*, 13 *East*, 238. 2 *Camp.* 517. *Abbot on Shipping*, 21.

Ex parte HARTOPP.

LINCOLN'S INN HALL, 13th *August*, 1813.

It is no Objection to an Application by a Messenger, that the Assignees may be directed to pay him his Bill of Fees, that he has neglected to make a Demand upon them till after final Dividend: they must be presumed to have known of his having such a Claim, and ought not to have distributed the Funds, without reserving sufficient to satisfy it.

No Doubt of the Jurisdiction in Bankruptcy, to order Assignees to pay a Messenger's Bill of Fees.

THIS was the Petition of the Messenger to the Commission, praying that the Assignees might be directed to pay him his Bill of Fees. In Support of the Petition, and of the Jurisdiction of the Court to make the Order, *ex parte Hartopp*, 9 *Ves.* 109. 12 *Vesey*, 349, was referred to.

Sir

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Ex parte Harrop.

Sir *Samuel Romilly* and Mr. *Montague* in Support of the Petition.

Mr. *Cooke*, for the Assignees, did not dispute the Principle of those Cases; but urged, that the Messenger was in this Instance concluded by his own Laches. His Bill ends in 1805; subsequent to that Time there was a Dividend ordered and paid; he ought then, and previously to that Dividend, to have brought in his Bill, nor suffered the Assignee to distribute the Effects without reserving sufficient to answer it.

The Lord Chancellor.

Whatever Objection may have been urged against this Jurisdiction, it has now been too long exercised not to be acquiesced in. The petitioning Creditor is liable to the Solicitor, for the Expenses of conducting the Commission up to the Choice of Assignees; and although the Solicitor may maintain an Action against him for his Bill of Costs, yet this Court would not hesitate upon Petition, to make an Order upon him for the Payment of it. The Assignees are directed (*a*), out of the first Funds they receive, to reimburse the petitioning Creditor; and although an Action would lie against them, yet this Court would not scruple to direct them so to apply the Funds. So where the Messenger has been turned out of Possession, by a Stranger to the Commission, there is no Doubt of the Jurisdiction to visit it as a Contempt (*b*).

As to the Objection relied on in the present Case, that the Messenger is concluded by his Neglect to apply till after the Funds have been distributed, the Assignees must be presumed to have known that they were indebted to the Messenger. It was their Duty to pay him, and the

(*a*) 5 *Geo.* II. c. 30. s. 25. (*b*) *Ex parte Page*, *ante*, 1.

Distribution

Distribution of the Funds, without having done so, is their own Misconduct. If they choose to have his Bill taxed, they are entitled to do so, but subject to that let the Petitioner take the Order.

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Ex parte HARTOPP.

Ex parte BYNE.—In the Matter of BRYANT (*a*).

February 22, 1813.

A Witness attending before Commissioners, in order to tender his Testimony upon a Subject of Inquiry then before them, without having been summoned for that Purpose, is privileged from Arrest during such Attendance and returning.

Query, if protected *eundo*?

BYNE, voluntarily and without Summons, attended a Meeting of Commissioners, in order to tender his Evidence, upon an Inquiry then depending before them. While he was so in Attendance, and previously to his Evidence having been either accepted or rejected, he was arrested.

Upon a Motion for his Discharge, suppbrted by Affidavit,

The Lord CHANCELLOR

Was of Opinion, that the Want of a Summons, or a Subpœna, ought not to deprive a Witness, actually in Attendance, for the Purpose of giving Testimony, of that Privilege, which upon Common Law Principles, and for the Objects of Justice, he was entitled to: that during such Attendance and returning he was protected: what would be the Effect if he were arrested *eundo*, it was not then necessary to decide.—Ordered to be discharged at the Costs of the Creditor.

(*a*) 1 *Ves.* and *Beames*, 316.

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Ex parte BYNE.—In the Matter of BRYANT.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Montague*, in Support of the Application.

Mr. *Cullen contra*.

Vide ex parte Ross, in the Matter of *Ross*, *ante*, 260.

LINCOLN'S INN HALL. 6th *August*, 1813.

A Debtor compounded with his Creditors; then became bankrupt, and obtained his Certificate, but without paying fifteen Shillings in the Pound: afterwards another Commission issued against him.—Petition to supersede the last Commission, upon the Ground, that, under the Circumstances, all his Property belonged to the Assignees under the first Commission, dismissed. The Lord *Chancellor* being of Opinion, that by the Stat. 5 *Geo.* II. c. 30. s. 9. the future Property could not be taken Possession of by the Assignees, on Behalf of the Creditors under the Bankruptcy; but by the Creditors, as such, either generally or individually, proceeding against their Debtor, in a Court of Law or Equity.

Ex parte BAKER.—In the Matter of BAKER.

IN 1805, the Bankrupt made a Composition with his Creditors, to pay them ten Shillings in the Pound. On the 14th *March* 1808, a Commission issued against him, under which he obtained his Certificate, but he did not pay his Creditors fifteen Shillings in the Pound under that Commission. On the 4th of *February* last, another Commission issued against him, which it was the Object of his present Application to supersede, upon the Ground, that having first compounded with his Creditors, and having afterwards become Bankrupt, without paying fifteen Shillings in the Pound, all his Property belonged to his Assignees and his Creditors under his former Commission.

Mr. *Hart* and Mr. *Cullen*, in Support of the Petition.

Sir *Samuel Romilly* and Mr. *Montague contra*.

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Ex parte BAKER—In the Matter of BAKER.

The Lord CHANCELLOR.

It is unnecessary upon this Petition, to decide what the former Creditors of this Bankrupt are entitled to as Creditors, or whether the Species of compounding in this Case, is a Composition within the Act. It is sufficient to say, I think there is nothing in the Objection to prevent the Operation of the present Commission. The Words of the Section are the "future Effects (*a*):" and the Distinction seems to be taken in the Language of the Statute. Where there has been a first Commission, and the Bankrupt has obtained his Certificate under it; and then a second Commission, and under the second the Bankrupt has not paid fifteen Shillings in the Pound, the future Estate and Effects are liable, because there have not been fifteen Shillings in the Pound paid. Where there has been a first Commission, and the Bankrupt remains uncertificated, it is said that the second Commission cannot be maintained, because all the Property still remains in the Power of the Commissioners under the first Commission to assign. Nothing, therefore, can be considered as future Property, within the Meaning of the Act, but Property acquired by Title subsequent to the

(*a*) The Statute 5 *Geo.* II. c. 30. s. 9. provides, that "In Case any "Commission of Bankruptcy shall "issue against any Person who "shall have been discharged by "Virtue of this Act, or shall have "compounded with his Creditors, "or delivered to them his Estate "or Effects, and been released by "them, or been discharged by any "Act for the Relief of Insolvent "Debtors, that then the Body "only of such Person, conforming "as aforesaid, shall be free from "Arrest and Imprisonment, by "Virtue of this Act; but *the future Estate and Effects* of every "such Person shall remain liable "to his Creditors, *as before the "making of this Act*, (the Tools of "Trade, the necessary Household "Goods and Furniture, and ne- "cessary wearing Apparel of such "Bankrupt, and his Wife and "Children only excepted), unless "the Estate of such Person, against "whom such Commission shall be "awarded, shall produce clear, "after all Charges, sufficient to "pay every Creditor under the "said Commission, fifteen Shil- "lings in the Pound."

The Cases upon this Section are, *Thornton* v. *Dallas*, *Doug.* Rep. 46. *a. Philpott* v. *Corden*, 5 T. R. 289. *Haviland* v. *Cook*, *ibid.* 654. *Hovil* v. *Browning*, 7 *East.* R. 154. *Jelfs* v. *Ballard*, 1 *Bos.* and *Pul.* 467. *Ville Christian's* Bank. Law, 147.

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Ex parte BAKER.—In the Matter of BAKER.

Allowance of Certificate, and therefore not within the Power of the Commissioners and the Reach of the Assignees. When, therefore, under a second Commission, fifteen Shillings in the Pound are not paid, the Creditor can reach the future Effects, not as Creditors under the Bankruptcy, but as Creditors generally and individually. As Creditors under the Bankruptcy, they could only make their Right available by Means of the Assignees: but after the Certificate the Property is uncontrolled by the Assignment. Some of the former Insolvent Debtors Acts also prescribed, that the future Effects shall be liable, but they never could be got at, except either by a Bill in Equity on Behalf of all the Creditors, or by the Diligence of an individual Creditor, suing in the usual Manner to Execution. That Difficulty has, I believe, in the late Act, been provided against.

Petition dismissed.

LINCOLN'S INN HALL. *August*, 1813.

Ex parte FLETCHER.

Commission superseded on the Ground of Delay in opening it; but the Bond not assigned, because that is conclusive at Law, and there may be a better Remedy by Action on the Case.

THE Petitioner, who in *March* last (*a*), had obtained an Order restraining the Publication of his Bankruptcy in the Gazette, upon an Affidavit of his Solvency, and of his not having committed an Act of Bankruptcy: now applied to have the Commission superseded, and the Bond assigned, upon a Statement, that nothing had been done

(*a*) *Ante*, p. 336.

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done under the Commission, from that Time to the present Month of *August*, when, at a Meeting of Commissioners convened for that Purpose, the petitioning Creditor had been unable to establish an Act of Bankruptcy against him.

Mr. *Shadwell*, in Support of the Application.

The Solicitor to the Commission, in Answer to a Question from the Lord *Chancellor*, as to the Reason of the Delay, said, that the Conduct of the Commission had been but lately entrusted to him, but that he had no Doubt of being able to produce the necessary Evidence.

The Lord CHANCELLOR.

On Account of the Lapse of Time alone, I will supersede this Commission, even if you were now prepared to prove an Act of Bankruptcy. I am not in the Habit of assigning the Bond, because that is conclusive at Law against the Defendant, without being more advantageous to the Party injured; who may have a better Remedy by an Action on the Case.

Ex parte Smith, ante, p. 332.
Ex parte Puleston. (2 *P. Wms.* 545.) *ibid.* N.

Ex

Hilary Term. 1813.

Ex parte GRAHAM and OTHERS.—In the Matter of MACKENZIE.

Commissioners cannot expunge a Proof: as long as it remains upon the Proceedings it must be considered as a Debt; and upon a Petition to pay the Dividends upon it, the Order of Dividend is conclusive.

NEWNHAM and Co. had proved a Debt upon certain Bills of Exchange under this Commission; and on the 9th of *July* 1811, Dividends were declared upon their Proof, to the Amount of 1141*l.* The Petitioners, who were the Assignees, believing the Debt to be usurious, refused to pay the Dividends, and retained them at the Bankers of the Estate. *Newnham* and Co. presented a Petition to have the Dividends paid. On the 22d of *July* 1812, subsequent to the petition Day, the Bankers failed. In *August* 1812, that Petition came on to be heard; and the Lord *Chancellor* thinking, that for the Object of that Petition the Order of Dividend was sufficient (*a*), made an Order that the Assignees should pay the Dividends; not precluding them, if they thought fit, from presenting a Petition to expunge the Debt.

An Order for Payment of Dividends declared, upon a Creditor's Petition for that Purpose, raises (like the Execution in the Action for which the Petition is substituted) a personal Responsibility against the Assignee: thus, in this Case, an Assignee resisting the Payment of Dividends declared, upon the Ground Usury, and retaining the Amount of them at the Bankers of the Estate, who failed, was (not being able to expunge the Debt) ordered to pay the Dividends out of his own Pocket.

The Assignees not having presented such a Petition, *Newnham* and Co. in *December* last, proceeded to enforce their Order by Attachment. The Petitioners

(*a*) *Ex parte Whiteside, ante,* p. 319.

now

now applied to restrain them, and to have the Order varied, by inserting a Direction, that the Dividends might be paid out of the first Assets of the Bankrupt which should come to their Hands.

Mr. *Trower*, Mr. *Agar*, and Mr. *Montague*, in Support of the Petition, urged, that the Assignees ought not to be responsible for the Solvency of the Banker; that it was their Duty, honestly believing the Debt to be usurious, to resist the Payment of it. To have drawn the Dividend out would have exposed them to the 20 *per cent.* Penalty under the late Act (*a*); and to have paid it to *Newnham* and Co. would have prejudiced the Question.

Sir *Samuel Romilly* and Mr. *Cullen, contra*, contended that the Assignees having taken upon themselves to withhold the Dividends, must be responsible for the Consequence; that the Loss ought not to attach upon Parties entirely innocent of the Cause of it.

The Lord CHANCELLOR.

Before the late Act (*b*), the Method of compelling Payment of a Dividend declared, proceeded, I apprehend, upon this Principle. A Commission was considered to be in the Nature of an Action and Execution, for all Creditors who came in under it; and as soon as the Sum to be paid was ascertained by the Order of Dividend, the Assignees are considered, by the Operation of something like a Judgment, to have received that Sum for the Use of the Creditor who had proved; who by

(*a*) 49 *Geo.* III. c. 121. s. 3. and 4.

(*b*) 49 *Geo.* III. c. 121. s. 12. No Action to be brought for Dividends, but the *Lord Chancellor* may order Payment upon Petition, and if the Case require it, with Interest and Costs.

Petition,

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Ex parte GRAHAM and Others.—In the Matter of MACKENZIE.

Petition, and shewing that it was declared, might have obtained an Order for the Payment of it.

It has been long established in Bankruptcy, that Commissioners cannot disturb a Proof; as long as it stands upon the Proceedings it must be considered as a Debt. An Assignee, therefore, who is desirous of protecting himself from the Payment of a Dividend, has no Course open but by Petition to expunge the Debt. In an Action at Law, nothing more was necessary for the Purpose of obtaining Execution against the Assignee, but to produce the Declaration and Order of Dividend, leaving the Assignee to apply here, with considerable Inconvenience, Delay, and Expense, to himself and the Creditors. It was considered that there would be great Convenience in having the Jurisdiction in this Court exclusively, because then the legal Demand, and the equitable Opposition, could be considered and disposed of together. But it never could be the Intention of that Clause, to take away the Remedy personally against the Assignee, or to say, that after a Dividend was declared, the Assignee should be in a better Situation than if, being sued at Law, he had come here to meet the legal Demand with an equitable Resistance.

The present Application of the Assignees in this Case, does not proceed upon the Ground, that the Money in Question ought not to be paid to *Newnham* and Co. Not disputing now that it ought to be paid to them, it prays that the Payment may be deferred, till they shall have received sufficient of the Bankrupt's Estate to pay it. In this View it introduces the Consideration of a Principle, extremely important not only to *Newnham* and Co. but to those Creditors who may be entitled to the future Dividends of the Estate. But how, consistently with Justice,

tice, can I make those liable for the personal Conduct of the Assignees, who are not in the least accessary to that Conduct? If an Assignee says, although a Dividend is ordered, I will not pay it; I will hold the Creditor at Arm's Length and resist the Payment of it; he must take the Consequences of it upon himself. I cannot throw it on these Creditors, or on the other Creditors; and as it must fall somewhere, it must be thrown on the Assignees, through whose Conduct it has originated. I think it would be introducing a most dangerous Principle to vary this Order; let the Petition therefore be dismissed, and let the Assignees within a Week pay the Money.

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Ex parte GRAHAM and Others.—In the Matter of MACKENZIE.

LINGARD *v.* HIBBERTSON and MATHER.

LINCOLN'S INN HALL. *April*, 1813.

Equity will not restrain by Injunction further Proceedings at Law, upon a Verdict obtained through the Defendant's Neglect, to produce his Certificate in Evidence.

LINGARD the Plaintiff had, in *March* 1810, indemnified the Defendants against the Consequence of becoming Bail for a Person of the Name of *Jenkins*. The Bail, in *Trinity Term* 1810, became fixed; but Judgment was not obtained against them till *August* 1811.

On the 4th of *April* 1811, a Commission issued against *Lingard*; on the 18th of *June* following he obtained his Certificate. In *Hilary Term* 1812, the Defendants, the Bail, brought an Action against him on his Indemnity, to which he pleaded the general Issue and Bankruptcy, and that the Cause of Action arose before the Bankruptcy; but having neglected to produce his Certificate at the Trial, and secondary Evidence of it being rejected, a Verdict was obtained against him.

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LINGARD v. HIBBERTSON and MATHER.

The Bill, in Addition to the above Circumstances, alleged, that the Defendants well knew that he had obtained his Certificate; that they could now prove their Debts and receive Dividends *pari passu* with the other Creditors, without disturbing Dividends already made (*a*); and it prayed a Declaration, that the Verdict was obtained improperly, and an Injunction against further Proceeding upon it. The Injunction having been obtained for Want of an Answer, upon the Answer coming, a Motion was made to dissolve it by Mr. *Hart*, and Cause shewn against dissolving it by Sir *Samuel Romilly* and Mr. *Agar*.

The Lord CHANCELLOR.

Taking it for granted, that his Certificate would have been a Bar at Law, and that if produced it would have been available for that Purpose; yet, if the Party through Negligence has not availed himself of his Defence, is that a Ground of Relief here? Let the Injunction be dissolved.

Vide 1 *Font.* Equity, 157.

(*a*) 49 *Geo.* III. c. 121. s. 8.

LINCOLN'S INN HALL. 10th *August*, 1813.

Ex parte READ.

ATWOOD, as the Holder of a joint promissory Note, made by *Read*, *Lee*, and *Corrie*, took out a Commission against *Read*, and proved his Debt under it. He then brought a joint Action against *Read*, *Lee*, and *Corrie*. *Read* presented this Petition, praying, that his Name

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Name might be struck out (*a*), or that he might be indemnified by *Atwood*, against the Costs and Consequences of its remaining. An Order according to the latter Part of the Prayer had been made in *February* last (*b*); but some Doubt having arisen as to the Terms, it was this Day mentioned by Mr. *Benyon*.

The Lord CHANCELLOR.

If *Atwood* does not give an Indemnity within a Week, let the Bankrupt's Name be struck out.

(*a*) Under the 19 *Geo.* III. c. 121. s. 14. by which proving or claiming a Debt is an Election not to proceed against the Bankrupt at Law; relinquishing the Action as against the Bankrupt, not to affect such Action against others, jointly liable with him.

Read had, previously to his Petition, made a similar Application to the Court of *Common Pleas*. The Court refused to relieve him upon Motion, leaving him to plead it.

(*b*) 1 *Ves.* and *Beames*, 346.

APPENDIX.

APPENDIX.

(a) **The ROYAL BANK of SCOTLAND, and GEORGE MITCHEL, Esq. their Cashier, for their Behoof, Creditors of SCOTT, SMITH, STEIN, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of JOHN and ROBERT STEIN, individual Partners thereof:**

against

JAMES CUTHBERT and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against THOMAS SMITH, JOHN STEIN, ROBERT STEIN, JAMES STEIN, and ROBERT SMITH, carrying on Trade in *London* under the Firm of STEIN, SMITH, and Co. and against the said THOMAS SMITH, JOHN STEIN, ROBERT STEIN, JAMES STEIN, and ROBERT SMITH, Respondents.

COURT of SESSION.
Second Division.
Nov. 12, 1812,
Jan. 20, 1813.

A Commission of Bankrupt, vests in the Assignees under it, all the Property of the Bankrupt, wherever situate; precluding Creditors in *Scotland*, from attaching by Sequestration, their Debtor's Property remaining or situate in that Country, and from administering it in a Course of Distribution, under such Process of Sequestration: and, although the Commission does not in itself operate upon the heritable Property of the Bankrupt in *Scotland*, yet it imposes upon him a legal Obligation to execute the proper Conveyances, and do the necessary Acts for transferring it to his Assignees.

Semble, that the Converse of the above Proposition applies to the Case of a Sequestration in *Scotland*; and that it would preclude English Creditors, from suing out, or sustaining a Commission, against a Debtor, who was the Subject of an antecedent and operative Sequestration.

Whether the Commission or the Sequestration is to be preferred, as the Mode of administering the Debtor's Effects, depends upon their Priorities.

Thus, where four Traders carried on Business in Copartnership, having a House of Business in *London*, and another in *Edinburgh*, and two of the Partners, till the Bankruptcy, resided in *Edinburgh*, and severally carried on Trade there distinct from the Copartnership, and the Rest of the Partners resided in *London*; a Commission of Bankrupt against the Partnership was held to be a complete Bar to a Sequestration, either against the Property of the Partnership in *Edinburgh*, or the personal or real Property of the separate and resident Traders.

A Certificate obtained under an English Commission, operates as a Discharge of the Debts of Scotch Creditors proveable under the Commission.

Whether or not the Commission is a valid Commission, is a Question for the Decision of the Lord *Chancellor*, the Courts of *Scotland* not having Jurisdiction upon that Subject; but query if the Court of Session were satisfied, that the Party subjected to the Commission was domiciled in *Scotland*, and had not been domiciled in *England*, whether they would be bound to give Effect to it?

Dubitante, Lord *Bannatyne*, whether the Sequestration ought not to be awarded *quoad* the separate Estates of the two resident Traders, *John* and *Robert Stein*.

Sentiente, Lord *Cragie*, that the Sequestration ought to have been awarded by the Lord Ordinary in the first Instance, reserving the Effect of it for after Consideration. Lord Justice *Clerk* expressed a similar Doubt.

THE Facts of this Case were as follow:

John Stein was a Distiller at *Canonmills*, in the Neighbourhood of *Edinburgh*.

(a) The Reporter is indebted to the Kindness of Mr. *Montague*, for the Means of making public this important Case of international Bankrupt Law; having been favoured by him with the necessary Papers for that Purpose.

Robert

Robert Stein was a Distiller at *Kilbagie*, in *Clackmannanshire*.

1818.

The Royal Bank of *Scotland*, and *George Mitchel*, Esq. their Cashier, for their Behoof, Creditors of *Scott, Smith, Stein*, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of *John* and *Robert Stein*, Individual Partners thereof, against *James Cuthbert* and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, carrying on Trade in *London*, under the Firm of *Stein, Smith*, and Co. and against the said *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, Respondents.

John and *Robert Stein*, together with *William Scott* deceased, *Thomas Smith*, *Robert Smith*, and *James Stein*, carried on Business as Bankers and Insurance Brokers, in *Edinburgh*, under the Firm of *Scott, Smith, Stein*, and Co. They were also Partners in a Trade in *London*, under the Firm of *Smith, Stein*, and Co. All the Parties were Natives of *Scotland*; where *John Stein* and *Robert Stein* had constantly resided.

Scott, Smith, Stein, and Co. became insolvent in the Month of *July* last. *John Stein* and *Robert Stein*, at the same Time, individually suspended their Payments in the distillery Business.

The Informants or Petitioners, the Royal Bank of *Scotland*, were the Holders of two Bills of Exchange, one for 5000*l*., the other for 6000*l*., drawn by *Scott, Smith, Stein*, and Co. of *Edinburgh*, upon *Kensingtons, Styan*, and *Adams*, late Bankers in *London*. These Bills had been discounted by the Drawers at the Royal Bank, and had been dishonoured.

Upon the Dishonour of these Bills, *John Stein* and *Robert Stein* declining to concur in a Petition for a Sequestration, the Informants proceeded to render them Bankrupts by Diligence. Letters of Horning were raised and executed against the Company, and also against *John Stein* and *Robert Stein*, as Individuals. They were charged with Horning (*a*), Caption issued, and they were by Executions of Search (*b*) brought within the Operation of the 33d of the King, c. 74.

In the mean Time, however, *John Stein* and *Robert Stein* had withdrawn themselves into *England*, where, on the 11th of *August* last, a Commission of Bankrupt (*c*) issued against them and their Partners, described as "carrying on Trade in *Fenchurch-street*, *London*, under "the Firm of *Smith, Stein*, and Co." On the same Day, the Commissioners assigned to a provisional Assignee, by two several Indentures, 1st, All the Estate and Effects of the Parties situated in *England*: and 2dly, All the Estates and Effects, real and personal, heritable and moveable, belonging to the said Parties situated in *Scotland*.

By an Indenture dated 22d *August* 1811, the Bankrupts conveyed to

(*a*) *August* 14, 1812.
(*b*) *August* 25, 26, 27, and 28, 1812.
(*c*) An authenticated Copy of the Petition for the Commission, with the Lord *Chancellor's* Award on it, and of the two Indentures, were produced and lodged in Process.

the

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The Royal Bank of *Scotland*, and *George Mitchel*, Esq. their Cashier, for their Behoof, Creditors of *Scott, Smith, Stein*, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of *John* and *Robert Stein*, individual Partners thereof, against *James Cuthbert* and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, carrying on Trade in *London*, under the Firm of *Stein, Smith*, and Co. and against the said *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, Respondents.

the provisional Assignee, all their real and personal Property in *Scotland*; and they also, together with the provisional Assignee, executed a Power of Attorney to an Agent in *Scotland*, empowering him to take Possession of, and recover, the Estates and Effects in *Scotland*.

Upon the Appointment of the regular Assignees, the Bankrupts of the provisional Assignee made a similar Conveyance to them (*a*). They also on the 7th and 8th of *September* executed general Dispositions of their whole heritable and moveable Property situated in *Scotland*, in the Scotch Form. Those Deeds were recorded in the Books of Council and Session of this Date (*b*), and subsequently, the Assignees obtained special Dispositions to the different Properties belonging to the Bankrupts, upon which they were infeft.

The Royal Bank having taken the Steps already stated, to render the Company of *Scott, Smith, Stein*, and Co. and the Individuals *John Stein* and *Robert Stein*, Bankrupts by Diligence, in further Pursuance of that Object, applied to the Court of Session for Sequestration. Upon the Petition for Sequestration, both against the Company, and *John* and *Robert Stein* as Individuals, Appearance (*c*) was entered on the Part of the Respondents, who objected to its being summarily awarded. For the Bank, it was contended, that according to the Statute, the awarding of a Sequestration was, *ex debito*, a Matter of Course; that it could not be opposed, and that the only Relief against the Process was by an Application for a Recal of it within the thirty Days. Lord *Bannatyne*, as Lord Ordinary, officiating upon the Bills, ordered the Case to be stated in mutual Memorials (*d*). They were accordingly lodged, and the following Interlocutor (*e*) pronounced. "The Lord *Bannatyne*, "Ordinary, officiating on the Bills, having heard Counsel for the "Royal Bank of *Scotland*, Petitioners, and for Messrs. *Cuthbert, Smith*, "*Duval*, and Others, Objectors, and considered the Pleas stated in the "mutual Memorials given in for the Parties, judging the Case as one "fit to be brought under the immediate Consideration of the Court, "appoints these Parties to state the same in Informations, to be seen "interchanged and boxed against the first sederunt Day in *November* "next, under an Amand of forty Shillings Sterling each, in order to "be reported to the Lords of the second Division."

The Cases on both Sides were accordingly stated, and submitted to the Lords of the second Division.

(*a*) *September* 1, 1812.
(*b*) *September* 16, 1812.
(*c*) *August* 29, 1812. A Note was presented *September* 8.
(*d*) *September* 9, 1812.
(*e*) *October* 13, 1812.

The

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The Royal Bank of *Scotland*, and *George Mitchell*, Esq. their Cashier, for their Behoof, Creditors of *Scott, Smith, Stein*, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of *John* and *Robert Stein*, individual Partners thereof, against *James Cuthbert* and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, carrying on Trade in *London*, under the Firm of *Stein, Smith*, and Co. and against the said *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, Respondents.

The Argument for the Royal Bank proceeded, 1st, Upon a preliminary Objection to the Title of the Objectors: 2dly, Upon the Merits.

The Title assumed by the Objectors is, first, that of Assignees under the Commission of Bankruptcy; and secondly, of Assignees under certain private Conveyances made to them by the Bankrupts. But there is no legal Evidence either of the Commission, or of the Assignment under it. The sole Evidence produced is a Copy of the Petition, said to have been presented to the Great Seal; a Copy of the Commission, said to have been issued; a Copy of the *London Gazette*, in which a Notice appears of the issuing of this Commission; and a Certificate of the English Solicitors that the Commission was issued, and the Objectors appointed Assignees. It is necessary to shew, as Evidence of Proceedings, either the Originals, or Records properly authenticated. If the Commission were produced, it might be found liable to a thousand Objections; and without producing the Commission, the Respondents cannot be listened to as having a Right under it.

It is said, that if the Commission be doubted, the Court can order it to be produced, but that is not the Point; it is, whether a Process so peculiar as Sequestration shall be stopped, where no legal Evidence is produced in Opposition to it.

Admitting, however, that the Copies may be received as Evidence, they do not support the Objection of the Respondents to stop the Sequestration. They object that the Sequestration is needless, that there is already a Commission of Bankruptcy issued against *the Company*. That does not appear. The Bankrupts are described as trading in *London*, under the Firm of *Smith, Stein*, and Co.; and they are not (as the Fact has been in every former Case of this Sort) described as trading in *Edinburgh*, under the Firm of *Scott, Smith, Stein*, and Co. The Commission, therefore, does not, *ex facie*, present a Fact, of which the *Chancellor* can be presumed to have been apprized at the issuing of it. That they may be able to shew the Identity of the Companies, is no Answer to an Application for a Sequestration, which must be met, not incidentally, but by a *complete* exclusive Right. Supposing the Petitioners to know the Fact, they cannot, as Creditors applying for a Sequestration on Behalf of themselves and others, be called on to admit or disprove it. The *onus* is on the Respondents, to prove that they represent the Bankrupts: Sequestration ought not to abide the Result of the Enquiry.

Upon the Merits there are two Questions, 1st. The Right of the Respondents

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The Royal Bank of *Scotland*, and *George Mitchel*, Esq. their Cashier, for their Behoof, Creditors of *Scott, Smith, Stein*, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of *John* and *Robert Stein*, individual Partners thereof, against *James Cuthbert* and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, carrying on Trade in *London*, under the Firm of *Stein, Smith*, and Co. and against the said *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, Respondents.

Respondents to the Estate and Effects of *Scott, Smith, Stein*, and Co.; 2d. The Right over the separate Property and Effects of *John Stein*, at *Canonmills*, and of *Robert Stein* at *Kilbagie:* the first Question depends upon the English Commission of Bankrupt; the second depends upon that, and the voluntary Conveyances which the Bankrupts have executed.

The first Objection to the Commission is, that it is founded in a Fraud against the Scottish Creditors. Independently of the voluntary and fraudulent Act of the Bankrupts, they had no Domicile in *England* on which this Commission could have issued. A joint Commission must include all the Partners (*a*), and each must have committed an Act of Bankruptcy in *England*. The Law is different in *Scotland*. Sequestration could have been awarded against the Company of *Scott, Smith, Stein*, and Co. wherever the individual Partners had happened to be. At *the Time of the Failure*, therefore, the Domicile of the Company was in *Scotland;* without the Interference of the Bankrupts the Sequestration could not have been defeated. Whatever might be the Duty of the Bankrupts to their English Creditors, it certainly was contrary to their Duty to their Scottish ones to deprive them of their Remedies. It is, in Effect, a Bankrupt by his own Act, giving a Preference to one Set of Creditors over another, which is illegal by the Law of *Scotland*, 1696. c. 5. *M'Math.* v. *M'Kellars*, Trustees, 1st *March* 1791. In those Cases in *England*, where a foreign Debtor having come into *England*, his English Creditors have taken out a Commission against them, the great Judges who decided them, though forced by the Strength of former Determinations to support the Commission, have expressly declared it to be against their own Conviction of the Principle (*b*).

Whoever gives Credit, gives it upon the Credit of the Property a Man has in the Country where the Credit is given.

Even, however, if the English Commission were unexceptionable, as against the English Company, it cannot preclude a Sequestration operating against the Scotch Property. The Ground on which the Objectors rely is, that Moveables have no *situs*. This however is not a Rule of Law, but merely a Fiction, operating only in those Cases which it was induced to regulate; and in other Cases, only by strict Analogy to them. Considering it thus, *Scotland* is the only Domicile which can authorize Proceedings against the Scottish Company. A Fiction never can work Iniquity. The Fiction, that Moveables have no situs, was invented to carry into Execution the presumed

(*a*) *Cullen*, B. 5, c. 1. s. 1. (*b*) *Coop.* Rep. p. 401.

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Will of Persons dying intestate, and rests not on any actual Alteration of Place in the Goods themselves, but on the Construction of the Owner's Intention to bring home his moveable Property, where he has settled his own Person. This Fiction has been to a certain Extent adopted in Bankruptcy. The Analogy was in many Points good: for, whether the presumed Will of the Debtor, or the Arrangement relied on by the Creditors were considered, the implied Destination of all a Trader's Moveables are to the Seat of his Trade: and when Bankruptcy, the Death of the Trader comes upon him; the Distribution of his Funds is relied on to be made, according to the Law of that Place. But it is not necessary for a Trader to fix a *Domicile* in *England*, in Order to entitle a Creditor to sue out a Commission against him. A Scottish Merchant who has traded *to England* may, by going thither and committing an Act of Bankruptcy, entitle a Creditor to issue a Commission against him (*a*): Are your Lordships prepared to apply the Fiction to this State of the Fact; and on the Strength of it, to give Effect to such a Commission in this Country, the proper Domicile of the Debtor; to supersede your own Law, to which the Creditors have trusted as integral Parts of their Contract with the Debtor, at the Will of an English Creditor, or according to the Interest of the Bankrupt; placing Creditors at the Mercy of Accident, the Caprice or Fraud of the Debtor?

It is an essential Principle in the Law of Debtor and Creditor, that the Jurisprudence of the Country in which the Debtor resides, in which the Contract is made, and in which Execution is to proceed, so far as it has Influence on the Construction, or on the ultimate Effect of that Contract, forms an integral Part of the Connexion between the Creditor and the Debtor. While the Debtor continues solvent, he may have his Effects in other Countries, or may himself be there; but he cannot, without Fraud, do any Act intentionally to defeat the Rights to which his Creditors have trusted, or to force them to make their Claim according to the Rule of a foreign Law.

The Law of the Debtor's Domicile is that, by which in all Cases of Bankruptcy, his personal Property is to be vested in his Creditors for Distribution. This being the true Principle in the Case of an Individual, on what Ground is it possible to rest the extraordinary Doctrine, that where there are two Companies, and a double Domicile, the English Commission must necessarily supersede the Sequestration in *Scotland*?

(*a*) *Cullen*, Book I. c. 2, s. 4.

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It is admitted, that the Effect thus ascribed to the Commission, is derived from its Priority alone; and therefore it follows, not only that Sequestration could originally have been obtained in *Scotland*, but that it might, by the same Priority, have been the operative Process, and have brought all the English Effects hither for Administration and Distribution. But Sequestration could not have proceeded, except on the Footing of a Domicile in *Scotland*. Is there, then, any Incongruity in giving Effect to the Proceedings in each Domicile? The Informants do not contend for the Annihilation of the English Commission, as far as it applies to the English Company and their Effects; they only contend for the Efficacy of their own Proceedings, and the Preservation of their Rights as Scottish Creditors. Under a Commission and a Sequestration (and if the Debtors had fairly given their Aid to both Class of Creditors, they might have been obtained on the same Day) the two Administrations would proceed, each in its own Way, administering the Funds of the two Estates. This was done in the Case of *Bertram, Gardner*, and Co. and *Baillie, Pocock*, and Co. though the Partners were the same, and the two Partnerships established under one original Deed. By this there would be a Saving to the individual Creditors, and to the Estate. The Creditors in the two Countries would soon come to an Understanding, and amicably arrange their Rights.

But there are some Considerations more important: if the Proceedings, whether by Commission or by Sequestration, which happen first to be taken, are to regulate the Bankruptcy, the Remedies against fraudulent Preferences may be defeated. If the English Commission takes Precedence, the Benefit of the Bankrupt Law of *Scotland*, as to challenging Preferences, will be lost; or the English Law, which destroys them by a Relation to the Act of Bankruptcy, must be let in upon the Scottish Creditors. Thus, Creditors and Merchants would be subject to Rules which never entered into their Conception: Frauds would be unredressed, and Transactions tainted as Frauds, which had no Taint of it in their Composition. Nor is this all. The English Commission comprehends only Moveables, and has no Effect whatever upon heritable Subjects. Those must be left to the territorial Law; and Torrents of Adjudications, and a Process of Ranking and Sale, must be the Consequence of denying Sequestration in *Scotland*. It is said in Answer to this Objection, that the Bankrupt is bound to convey all his Property to his Trustees or Assignees for his Creditors; admitting this to be so, such Conveyance, when it comes to be made the Subject of Proceedings in this Country, must be liable to Challenge, as being granted in Favour of one Set of Creditors over another. It is argued farther on the Side of the Objectors, that if two independent Courses of Proceeding were going on in *England* and *Scotland*, the one relative to the Firm of *Scott, Smith*,

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Smith, Stein, and Co. and the other to the Firm of *Smith, Stein*, and Co. it might be difficult to settle, to which Estate belonged a Fund lying, or Debt due, in a foreign Country: and that the Power of transferring, by an Entry in the Books, Property from the one Company to the other, might disappoint the Creditors of one Firm, and favour those of another, as much as by throwing the whole Funds into one Administration. But this is a Difficulty more in Appearance than Reality; indeed, it depends altogether on the Mistake, of assuming the Fiction respecting the Situs of Moveables, as a legal Principle. In a practical View, the Property abroad, and *nomina Debitorum*, must belong to the Company, out of which the Transaction arises. Fraudulent Transfers from one Firm to the other, must be left to the Remedies which the Law has provided, for the Redress of Fraud. The Informants cannot admit, that the two Companies, though they may be composed of the same Partners, are to be held in Law to be identified. It is perfectly possible for the same Individuals, to form two distinct Companies for carrying on separate Trades. The Creditors of these Establishments, and the Funds to which they trust, will be distinct; and on Bankruptcy they would be liable to separate Sequestrations (*a*). But it is said, that here the Objects and Trade of the Companies, as well as the Partners, were the same; and when that is the Case, the Funds and Debts must be blended as those of one Concern: although that may be so in the Case of two such Companies existing in the same Country, it is different where the Companies are established in distinct Countries. The Trust then constituted, takes its Colour from the Law of the Country, which enters into the Dealings of the Firm with its Creditors; and to blend the Funds and Debts together, would be to alter the stipulated Rights of the Parties.

The Informants then conclude, 1st, That even were the Proceedings in *England* unexceptionable, they cannot exclude the Sequestration of the Scottish Law, when demanded against the Property of a Scottish Company, domiciled and trading there; and when applied for by Creditors, who have trusted to this Company on the Faith of the Scottish Laws.

2dly, That every Degree of Justice is secured to the Creditors in both Countries, arising from the alleged Identity of the two Companies, since they may respectively claim in each Country.

3dly, That if a Commission of Bankrupt were entitled to a Precedence, so as to supersede a Sequestration, the Commission, in this

(*a*) The Case of *Forrester*, 5th *Feb.* 1798.

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Case, is grounded on the Fraud of the Bankrupts, and therefore cannot avail either the Bankrupts, or those who derive Right from them.

It remains to consider the Effects of the Proceedings and Conveyances, over the Estate and Effects of Mr. *John Stein*, and Mr. *Robert Stein*.

John Stein and *Robert Stein* were Natives of, and domiciled in *Scotland*, and there became insolvent; after this, in *fraudem legis*, they went to *England* to have a Bankruptcy declared there, instead of having it completed in *Scotland*. A Commission so obtained is, as against Creditors in this Country, a voluntary Conveyance. Had they remained in *Scotland*, they could not have granted any Conveyance in Trust, even for the general Behoof of the Creditors, for they had been bankrupt under the Act 1696, and were thereby incapacitated (*a*); much less could they have granted a Conveyance, in Favour of one Set of Creditors over the Rest. Yet the Conveyance implied in this Commission, as to the personal Estate of the Bankrupt, has precisely this Effect. The Act having been done in *England* can make no Difference (*b*). However it may be therefore, as against the Company, there is no effectual Commission against the private Estate of *John* or *Robert Stein*. The Argument applies with greater Force to the voluntary Conveyances executed by Messrs. *John* and *Robert Stein*. It is quite plain, they are reducible upon the Act of 1696, upon the Principles already stated. The only Answer which has been offered is, that to execute those Deeds was a Duty imposed on the Bankrupt by the Bankrupt Laws. But there is no imperative Enactment in the English Bankrupt Law, obliging a Bankrupt to convey his Estate to the Assignees. The Assignment in Bankruptcy is not, as in this Country, executed by the Bankrupt, but by the Commissioners, in whom the whole of his Estate and Effects are vested. Any Conveyance, therefore, of their personal Estate in this Country was unnecessary, if it were already affected by the Commission; and if it were not, the Conveyance of it to the Assignees, in Prejudice of the Scottish Creditors, is a Fraud (*c*). That applies more strongly to their heritable Estate in this Country, which it is admitted was not affected by the Commission.

It was argued for the Respondents in Effect as follows.

Although it was long a Question of Difficulty, it is now, on the Authority of a Mass of Decisions, held to be the Spirit of both Scotch and

(*a*) *Hutchinson* v. *Gibson*, 8 *December*, 1791.

(*b*) *Syme* v. *Thomson*, 3 *Dict.* p. 55.

(*c*) Bankrupt Stat. 1621. 1696.

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English Bankrupt Laws, that when either a Commission is awarded in one Country, or a Sequestration in the other, the *Whole* of the Property of the Bankrupt, wherever situated, shall, under that Sequestration or Commission, be distributed among the Creditors; and that, consequently, there can be no co-existent Commission and Sequestration with Regard to the same Estate (a).

If, then, as the Authorities establish, the Commission and Assignment give the Assignees Right to take and distribute, for the Benefit of the Creditors, the *personal* Property of the Bankrupt situate abroad; it follows, that the same Property cannot be attached by any Process, at the Instance of others, in a foreign Court, unless, by some Peculiarity of Circumstances, the Law of the Country directly prefers those opposing the Assignees, which is not pretended to be the Case here. In such a Situation, the Law of *England* recognizes the Right of the foreign Judicatory to enforce its own Law, though it may disapprove of the Principle on which that Law is founded.

The same Principle regulates the real Property of the Bankrupt situated abroad. The only Difficulty being, "as to the Manner in "which Assignees are to come at Property of this Kind; not only out "of the Reach of the Jurisdiction of our Courts, but subject to such "positive Institutions and local Usages, as every where govern both "the Enjoyment and Transmission of it (b)." Adopting this Qualification, the Respondents do not pretend, that the Commission *ipso facto* operates as a Conveyance of the Heritage in this Country; but they maintain, that it imposes upon the Bankrupts an Obligation to make over that Property, by a valid Conveyance, to the Assignees: and that in this Case, such Conveyance having been made according to our Law, the Whole of the Bankrupt's Estate is legally vested in the Assignee, leaving nothing that can be carried by the Sequestration.

Such being the Doctrine of the English Law, the later Decisions in *Scotland*, and the Terms of the Bankrupt Act, recognize the same Principle. It is now established Law as to moveable Property (c); and there is no Doubt, that the same Principle applies to heritable Property. A short Examination of the Progress of our Law, may not be improper here.

It was at one Time held, that an English Commission did not operate *extra Territorium*; but that the whole Bankrupt Property, heritable

(a) *Cullen*, p. 173, 185. *Montagu*. Digest. vol. 1, p. 661, 342. *Sill* v. *Worswick*, *H. Black*. 665. *Philips* v. *Hunter*, *H. Black*. Rep. 402.

(b) *Cullen*, p. 185.

(c) *Bell's* Bankrupt Law of *Scotland*.

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and moveable in *Scotland*, remained open to Attachment by Diligence in the Scotch Court. *Ogilvie* against the other Creditors of *Aberdeen* (*a*), and many similar Cases, down to the great Case of *Struther* against *Reid* (*b*), and the Case of the Trustee for *Fairholme's* Creditors against *Boulton*, Assignee for the Creditors of *Garbett*, 20th *November*, 1805 (*c*), put the Scots Law, with Regard to the Effect of a Commission, on precisely the same Footing as the English Law, as far as Moveables are concerned. And although the Decisions have not extended to heritable Property, the Principle of enabling the Assignees under a Commission, or the Trustees under a Sequestration, to proceed unmolested in applying the Bankrupt's Funds to the Payment of the Creditors at large, applies equally to the heritable as to the moveable Estate. According to Mr. *Bell* (*d*), "the Proceedings in foreign "Bankruptcy will not, *ipso jure*, operate as a Conveyance to Assignees, "but will enable them to take such Proceedings as may be necessary "for completing the Transference, according to the Forms of Scotch "Law." He notices that Clause of the Bankrupt Act (*e*), which provides, that the Bankrupt shall, if required by his Creditors, or the interim Factor, grant Powers of Attorney, or other Deeds, which may be deemed necessary or proper, for the Recovery of the Estate and Effects, situated in foreign Parts, under the Pain of fraudulent Bankruptcy; on which he justly remarks, "that on the very same Principle, "the *proper* Deeds granted by a foreign Bankrupt, will receive Effect "in this Country." The Caution of adopting a *proper* Title Deed, removes the chief Difficulty. In every Country, real Property is enjoyed or conveyed under Forms of Title Deeds peculiar to itself. Assignees claiming that Property should, like every other Claimant, comply with the Forms. That has been done in the present Case. The Reasoning of Mr. *Bell*, on the Passage of the Bankrupt Act which he quotes, is confirmed by the Clause which ordains the Bankrupt, under Pain of Imprisonment, after the Court has approved of the Nomination of the Trustee, to execute proper Deeds of *Conveyance or Assignment* of his whole Estate and Effects, *heritable* and moveable, *real* and personal, *wherever situate*. It is quite clear, that the Legislature meant, that the Powers of the Trustee should extend to every Species of Property situate abroad; and that these Powers would receive the fullest Effect from the English Courts, if the Conveyances were executed with due Observance of the English Forms. The Result is, that the Sequestration must be inept, embarrassing the Assignees, and needlessly expensive. If the old Law, previous to *Reid* and *Struther*, had remained, or if the Bankrupts had refused to execute a Convey-

(*a*) *Ogilvie* against the other Creditors of *Aberdeen*, *Nov.* 13, 1747. *Kilk.* No. 4, p. 206, and many other Cases.

(*b*) *Fac.* Coll. N. 115, p. 253.

(*c*) *Bell's* Bankrupt Law of *Scotland*.

(*d*) *Bell*, p. 634.

(*e*) 33 *Geo.* III. c. 74, s. 15.

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ance of their Heritage here, there might be some Plausibility in the present Application: but, as Matters stand, it is in the Face of those general Principles of international Law, so lately and amply recognized by the Courts both of *England* and *Scotland*.

But it has been objected, that the Respondents have not produced legal Evidence of a Commission of Bankruptcy, of the Appointment of Assignees, or of a Conveyance to them; because the original Instruments are not in Process. But they have produced Copies certified upon Oath; the Originals being of Necessity retained in *England*, for the Purposes of the Bankruptcy there. The Practice of *Scotland*, as to written Evidence, is not so rigorous as that of *England*. Here certified Copies are *primâ facie* admitted: if any *bonâ fide* Doubt is stated, the Court will give the requisite Time for producing the Original. If the Petitioners dispute the Authenticity of the Commission, your Lordships can order the Production, and the Respondents must produce them. But the Petitioners in so disputing it, would act *pessimâ fide*, and would entitle us to their Oath of Calumny, before going to issue upon the Fact.

It is further urged, that the Commission has issued against the Bankrupts, as carrying on Business under the Firm of *Smith, Stein*, and Co. in *London*; and is therefore no Bar to the Sequestration against *Scott, Smith, Stein*, and Co., the Firm in *Scotland*. This Argument must either mean, that the Companies are not the same in Point of Fact, or that the Commission will not reach the Company's Funds in *Scotland*. Now of the Fact there can be no Doubt. As to the Effect of the Commission; according to the Practice in *England*, when a Company is bankrupt, only one Commission issues (as in the present Case), against the individual Partners(*a*), described as trading under the Firm. Under this Commission, not only are their joint Funds, but their separate Funds, conveyed to the Assignees; so that admitting a Doubt, as to the Identity of the Company, still the Scotch Property would unquestionably be carried under the Assignment; because every one of the Partners, who carried on the Concern in *Scotland*, is made bankrupt.

Another Argument of the Petitioners is, that as the Individuals of the Company are Scotchmen, and some of them domiciled in *Scotland*, their Property ought therefore to be distributed under the Authority of the Courts of this Country. This proceeds on the Mistake of confounding the Domicile of Succession with that of Jurisdiction. In Cases of personal Succession, a Person can have but one Domicile, that where he usually resides, *animo remanendi*. But he may have various Domiciles of Jurisdiction; and may be so domiciled, wherever he has an Esta-

(*a*) *Cullen*, p. 452.

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blishment, and carries on Trade. If *John* and *Robert Stein* had not to this Effect been domiciled in *England*, the *Chancellor's* Commission could not have issued against them. In this Case there are two Domiciles. The Petitioners contend, that there must be therefore two separate Systems of Management; one under the Control of the Court of *Chancery*, the other under that of your Lordships. The Respondents contend, that whether the Commission or the Sequestration is to be preferred, depends upon their Priority.

The Argument of the Petitioners merely rests upon the Inexpediency which they think they have discovered, in allowing a Commission in one Country, to prevent a Sequestration in the other. It is difficult to discover, in what Terms your Lordships can grant any Sequestration; or if granted, how the Bankrupt or his Trustee could carry it into Execution. A Sequestration confined to the Property in *Scotland* has never been heard of. If granted in the ordinary Terms, how can it be carried through? For if the personal Estate is already vested in the Assignees, how can the Trustee under the Sequestration proceed to collect it; or how can the Bankrupts, who have already executed a Conveyance of their real Estates to their Assignees, make another to their Trustees?

As to a Sequestration or Commission having no Effect *extra Territorium*, take the Example of a Merchant, who has a House of Trade in *Edinburgh*, and another in *London*; and a Commission is awarded against him in *England*. If that Commission does not carry the Moveables in *Scotland*, it follows that the Whole of the Scotch Creditors may compute individually with the Assignees, for those Moveables; so that that Race of Diligence would be produced, which it is the Object of the Bankrupt Law to prevent. But suppose that a Sequestration is awarded immediately after the Commission. As the chief Property of Traders consists in *nomina Debitorum*, which may be transferred by an Entry in a Book, the Bankrupt would have it in his Power to throw his Property under his Sequestration, or his Commission, as he thought fit; so that all the Advantages arising from these two Processes going on together would fail, leaving alone the Expense, Fraud, and Embarrassment arising from them. Supposing the Bankrupt to be honest, he may have Property which is situate neither in *Scotland* nor *England*: to which Trust is this to belong? Would it not occasion a Scramble among the distinct Sets of Creditors, or be perhaps grasped by some Creditor, *extra Territorium* of both?

It has been argued, however, in this Case, that there being two Domiciles, one in *England* and one in *Scotland*, and the Funds in the latter Country, the carrying them to the English Domicile by a Fiction would

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would be to throw the Balance in Favour of Domicile alone, against both Domicile and *Locus Rei Sitæ*. As to Moveables, the *Locus Rei Sitæ* does not apply; and as to real Property, can any Thing be more absurd than to maintain, that after a Bankrupt, in the express Terms of the Act of 1793, has granted a Conveyance to the Trustee of his real Estate *wherever situated*, he should be compelled to grant a second Conveyance to his Assignees in precisely the same Terms, because he happens to have a House of Trade in *London*? Or supposing when he is sequestrated in *Scotland*, he should refuse to convey his English Estate, on the Ground that he has a House of Trade in *London*; would not the Answer be irresistible, that his English Property is as much liable for his Debts as his Scotch Property, and that possibly no Commission might issue against him in *England*?

It is represented as a Hardship, that the Scotch Creditors should be compelled to claim under the Commission in *England*; but as this Inconvenience amounts only to the Trouble of employing an Attorney in *London*, it may be thrown out of the Question. It is also said, that the Debt being contracted in *Scotland*, and the Bankrupts, as it is alleged, domiciled there, the Creditors acted upon the Faith of having Access to the ordinary Tribunals of this Country. But, in Point of Fact, not one of these Considerations ever came for a Moment before the Imagination of the Petitioners, when they entered into the Transaction in Question. The Argument too is particularly absurd in the present Case; because the Bill, on which the Petitioners found their Claim, is made payable in *London*. But supposing these Considerations to have occurred to the Petitioners, is not the Evil one of daily Occurrence? Are not Debtors continually in the Habit of changing their Domicile? And was it ever supposed, that when Creditors sue them in the Place to which they have removed, they transport thither the Law of their own Country? The Presumption is, that Justice will be administered in every civilized Country: and if the Creditor gets the same Measure of Justice as the other Suitors of that Country, what Right has he to complain? If the Scotch Creditors relied upon the Property being distributed according to the Scotch Bankrupt Laws, surely the English Creditors have the same Plea. It is impossible to relieve one Set of Creditors except at the Expense of the others.

Another Consequence of the Petitioner's Application is, that should a Sequestration be obtained, they must, before they are allowed to draw one Farthing under the English Commission, refund whatever they have received under the Sequestration (*a*). It is presumed a similar Rule would be adopted in *Scotland*. The Consequence will be,

(*a*) *Hunter* v. *Potts*, 4 T. R. 182. *Jollet* v. *Deponthieu*, *H. B.* 132.

that

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that either the Commission or the Sequestration will be of no Use to the Creditors first claiming under either of them; or that some of the Creditors will obtain more than their just Share of the Bankrupt's Estate.

As to the Charge of Fraud against *Robert Stein* and *John Stein*, for having voluntarily subjected themselves to the English Commission; *Robert Stein* had resided in *England* six Months before the Commission had issued; nor could it be fraudulent, but honourable and proper, in *John Stein*, to go to *London* upon the Stoppage, where nine-tenths of his Creditors resided.

Lord ROBERTSON.

This is certainly a Casé of great Importance. But it appears to me, that we have clear Principles of international Law to govern our Decision; Principles which have been repeatedly recognized by the solemn Judgments of this Court, and to which I am of Opinion that we ought now to adhere; unless we are to throw into Confusion the whole System of our Bankrupt Law. Before I enter upon the general Question, I shall take Notice of some preliminary Points that are insisted on by the Royal Bank. In the first Place it is said, that there is here no legal Evidence of a Commission of Bankrupt having been issued, or of an Assignment having been granted by the Bankrupts under that Commission. It appears to me, that there is nothing in this Objection. It is an Attempt to introduce into the Practice of this Court, a Rule which prevails in *England*, but which is quite foreign to the Spirit of our Law. By the English Practice, if a Man sue upon a Bond, he must prove the Execution of it; or if the Assignees prosecute, they must prove the Act of Bankruptcy, and the Issuing of the Commission. All that may be very well, according to their Views; but we do not adopt it into our Practice. If a Paper is produced as the Ground of an Action in this Court, it is certainly competent for the Defender to deny the Authenticity of it. He may say, that the Deed is forged or fabricated; and if such an Allegation be seriously brought forward, it is incumbent on the Pursuer to establish the Authenticity of the Instrument, or, in other Words, to prove that it was truly granted by the Party, whose Subscription it bears: but it is only in Case of a Denial of the Authenticity, that we require such Proof. Now what is it that the Bank are denying here? They are denying that a Commission of Bankrupt was ever issued; and yet they tell your Lordships, that they have instituted Proceedings in *England*, in which they admit that it was issued, and crave that it may be recalled (*a*). How is it possible to listen to such an Averment? an Averment which is made and contradicted by the Party at one and the same Moment. In the

(*a*) *Vide ante*, p. 375. That Petition, and the Proceedings on it, were stated in the respective Memorials.

second

1813.

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second Place, it was argued very fully in the Bill Chamber, that there were here two separate Companies; that the House in *Edinburgh* and the House in *London* were distinct and independent Houses. This Averment is completely disproved by the Contract of Co-partnery, from which it appears, that there were the same Partners in both Houses, the same Trade, the same Capital, and that they were truly one and the same Company, to all Intents and Purposes whatever. In the third Place it was said, that the Commission was issued collusively; that Mr. *Stein*, who resided here, and was domiciled here, went to *England* for the very Purpose of committing an Act of Bankruptcy, that the Commission might issue. I see no Evidence of any such fraudulent Intention; but even if there were, is this the competent Court to try such a Question? It is said, that the Commission ought not to have Effect; but surely that Point ought to have been stated in *England*, before the Court from which it issued. Accordingly I see the Petition to the *Chancellor* expressly sets forth that very Allegation; and as this Petition has been dismissed by his Lordship, I do not see with what Propriety the Matter can be taken up by this Court. I am therefore disposed to disregard this Objection also. I shall now state what occurs to me on the Merits of the Cause. The Facts are extremely simple. A Contract of Co-partnery is entered into between six Gentlemen, one of whom is since dead. The Company, therefore, consisted of five, who agreed to carry on Business in *London* and in *Edinburgh*, and to have Establishments in both Places. Three of them resided in *London*, and the rest in *Edinburgh*. On the 24th of *July* last the Company became Bankrupt; a Commission of Bankrupt was sued out in *England*; and this took Place before any Proceedings had been held in *Scotland* for obtaining Sequestration. These are the undoubted Facts, and the Question arising from them is just this: Whether such a Sequestration can now be awarded, notwithstanding the prior Commission of Bankrupt? Here I pray your Lordships' Attention to the Terms of the Petition for Sequestration. You are asked to award Sequestration of the whole Estate and Effects, heritable and moveable, real or personal, any Way pertaining or belonging to the said Bankrupts, either as a Company or as Individuals, wherever situated. This is the ordinary Style of the Prayer of a Petition for Sequestration, founded on the express Provisions of the Act of Parliament; and yet if it were granted, and if your Lordships were to award Sequestration of the whole Effects, heritable and moveable, wherever situated, would not a Deliverance to that Effect just run counter to the subsisting Commission of Bankrupt issued in *England*, which, it is admitted on all Hands, will certainly carry the moveable Effects situated there? The Bank are aware of the Absurdity of this Conclusion; and they say, that they do not carry their Argument so far as to insist on the Annihilation of the Commission. But it is for us to consider, how far we

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we have any Power, under the Terms of an Act of Parliament, to issue a limited or qualified Sequestration, or a Sequestration in any other Terms than are authorized by that Statute, that is to say, a Sequestration of the whole Estate and Effects, heritable and moveable, real and personal, any Way pertaining to the said Bankrupt, wherever situated. Your Lordships have no Power in this Matter, but under this Statute; and I really do not see upon what Principle you can be warranted in departing from the Terms of it, which, if you are to award a Sequestration, are imperative upon you to sequestrate the whole Estate and Effects, heritable and moveable, wherever situate. It is a Question of great Importance, what is the Effect in *Scotland* of an English Commission of Bankrupt. In my Opinion, the Effect to be given to it in every Country where the true Principles of international Law are understood, is, that it must carry the whole Effects belonging to the Bankrupt. It is a Principle which has been long established, that Moveables have no Locality. They follow the Person of the Owner, and their Condition is governed by the Law of his Domicile. It may be said, that this is a Fiction; and it is so: but it is a Fiction, introduced upon the soundest Principles of Justice, and in Practice has been attended with the most beneficial Consequences. It has been confirmed by repeated Decisions, and it is a Principle which your Lordships will not now shake. It follows clearly, indeed, from attending to the Case of Transmission of Moveables, *inter vivos*; and the Doctrine is well laid down by Lord *Loughborough* (*a*), who states it as an undeniable Proposition of international Law, acknowledged wherever Law is a Science, that Moveables have no Locality. As a voluntary Conveyance of Moveables in *England* will carry those situate in other Countries, so must a Commission of Bankrupt issued in *England*, attach the whole Effects, wherever situate. This indeed was settled in *Scotland*, by the Case of *Struthers* against *Reid*, of which Case there is nothing said in the Memorial for the Bank: it is passed over in total Silence. But it is impossible for your Lordships to overlook the Effect of this Decision, in which the Principles I have mentioned were fully recognized, by a most solemn and deliberate Judgment. It is said, that the Jurisprudence of the Country, where the Transactions are entered into, is an essential Part of the Contract between Debtor and Creditor. This is certainly true; but what is the Inference from it? It is as good in the Mouth of an English Creditor as of a Scotch Creditor; and the Result would be, that there must be two Commissions going on, *simul et simul*, with all the inextricable Consequences, that must follow from such a System. It is impossible for your Lordships to listen to this Doctrine, without flying in the Face of the Principle of Law, that Moveables follow the Person. The Result of the whole Case, therefore, is, that there are

(*a*) *Sill* v. *Worswick*, 1 *H. Bl.* 665.

here

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here two Houses: one in *London*, where some of the Partners reside, and another in *Edinburgh*, where the others reside. The Consequence of this is, that there are two Domiciles; and the Consequence of that is, that the only Rule or Principle that we can apply to the Subject, is the Priority, in point of Time, of issuing the Sequestration or the Commission.

Lord MEADOWBANK.

As I concur entirely in the very accurate Opinion which has just been delivered, I do not mean to make many Observations. But the Question is of great Magnitude, and therefore I think it my Duty to say something. In studying these Papers, I naturally began with the Memorial for the Royal Bank; there is something said there about an Oath *de Calumnia*, though, if it were to be insisted on, on the other Side, to its full Extent, I do not know that it would be fair, to ask the Counsel for the Bank to swear, *ut lis sibi justa videtur*. It did astonish me to find in that Memorial, a complete Omission of all Notice of the Case of *Struthers* against *Reid*, which involved the Hinge of the present Question; the very Ground upon which the Whole turns, finding most distinctly that there was an Emanation, a binding Influence of the judicial Transfer in *England*, that reached the whole Bankrupt Estate in *Scotland*. That is the Import of the Decision in the Case of *Struthers*. Now if the Estate is carried, so as to be no longer attachable by Scotch Creditors, upon what Principle can your Lordships sequestrate what does not exist, since the whole personal Estate at least, is, by a solemn Judgment, vested in the Assignees? We have, however, a great Deal of Argument to shew, that this was a collusive Commission. This is very good in Point of Relevancy, but there is not one Word upon the Competency of this Court to try such Question. The Relevancy was very properly brought forward, and the Collusion stated pointedly and distinctly, in the proper Place where it ought to have been stated (*a*), and yet these Gentlemen tell your Lordships, that they had the Honour of withdrawing the Petition, in which these Allegations were made. Is that not abandoning the whole Ground on which they contend that the Commission ought to be quashed? Your Lordships cannot reduce and set aside the Lord *Chancellor*'s Commission of Bankrupt. You cannot, under any of the Sanctions of your Action of Reduction, reduce, decern, and declare against a Commission issuing under the Great Seal of *Great Britain*. The proper Step for this Purpose, was the very Step taken by the Bank. Why did they abandon it? They say that some of the Lines of their Petition to the Lord *Chancellor* were scored and defaced. I really cannot understand this. I see there was a solemn Affidavit put in, denying this Collusion *in toto*, after which the Petition was withdrawn. I suppose if it had

(*a*) *Vide ante*, p. 375.

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struck the *Chancellor*, as a Point that would be seriously insisted on, he would have ordered it to be tried at Common Law. But if they thought fit to withdraw their Allegation upon an Affidavit, denying the Collusion, must not I hold that Allegation to be false? That I apprehend was the Ground of the *Chancellor*'s Judgment. A different Ground indeed struck me, which may probably have influenced him, viz. that the Collusion is irrelevant. Is it a Measure of Collusion, that a Bankrupt grants a Bill for the very Purpose of founding an Application for getting Sequestration against himself? That is universally acknowledged to be a fair Measure in *Scotland*. It is an Act of Bankruptcy, but you cannot object to it, because it is done for the fair and honourable Purpose of cutting down partial Preferences, and doing equal Justice to the whole Creditors. I suspect the *Chancellor* would say, here is a perfectly fair Act done. This Gentleman comes here to the chief Domicile of the Company, and the Seat of all its Debts, to surrender himself to the great Body of his Creditors, and to expedite the Business of the Bankruptcy. Is there any Thing fraudulent here, any Thing collusive, any Thing but what must be admitted to be a fair and legitimate Purpose towards the Creditors? But again, as to the Competency, there is not one Word said about it by the Bank. It is incompetent for your Lordships to set aside this Commission. But is it competent for you to listen to the Bank, when they say we do not demand a total Reduction, we only pray you to reduce, decern, and declare *quoad Scotland?* Let it remain in *England;* we have withdrawn our Objection to it there: but do you find it null and void in *Scotland*. Now will your Lordships engage in a *Conflictus legum*, where the Party admits, that the Ground of Reduction, which if good at all would be good in *England*, has been withdrawn by him in *England?* Will you allow this to be done to the Effect of creating two incompatible Systems of Management, and throwing the whole Affairs into Confusion? It is said to be a Peculiarity of the Law of *Scotland*, that it considers the Stock of a Company, as a Pledge which the Company Creditors are first intitled to liquidate, and then to come upon the private Estates; and that it is a great Hardship for Scotch Creditors, who contracted upon the Faith of the Law of *Scotland*, to be deprived of this Benefit. From this it is inferred, that your Lordships ought to grant a Sequestration. But suppose the Sequestration were awarded, I should like to know any Principle by which you can prevent a Scotch Creditor from ranking under the English Commission, or an English Creditor from ranking under the Scotch Sequestration. There is here indeed only one Bankruptcy; but the Funds are to be divided among two Sets of Creditors, who may divide themselves at their own Option, and may come here or go there just as they please; was such an Anomaly ever heard of, as this Creation of opposite and inconsistent Systems? It is impossible to give Effect to it; you would involve

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involve them immediately in gross and palpable Injustice; I really cannot enter into the Ideas of the Petitioners for the Sequestration. I remember the Judgment in *Struther's* Case being pronounced. I can tell your Lordships that it was a most important Case, though I thought it went a Step beyond the Rules of international Law. For it was formerly a Principle, that a judicial Transfer only operated *intra Territorium*, and had no binding Influence beyond it. So much had this been the known Understanding of the Law of *Scotland*, that I remember struggling with Difficulty at the Bar, in a Case where the English Assignees had obtained a Decree against their Debtor, to enable them to prevail over a subsequent Arrestment. The Question was, whether the Commission was a proper Mode of transferring the Dominion in *Scotland*. I succeeded in the Case. The Court held that there was a Title to pursue, but that it required the Interposition of the Scotch Magistrate to give it Effect; that, in short, I had a good Title, if I chose to render it effectual. I remember, I thought that it was a difficult Thing to deviate so far from Principle, as to tranfer Property in *Scotland*, without Regard to our own Forms and Rules, and without an Intimation of the Assignment, or any Thing done to attach the Property according to our own Law. But what I yielded to, was the Consideration that it had been recognised as Law by Judgments of the *Chancellor* for so long a Period, that it might be considered as a Principle of the Law of Nations. Equiparating this Case, to the ordinary Case of Transference by Contract of Marriage, when a Lady of Fortune having a great Deal of Money in *Scotland*, or Stock in the Banks or public Companies there, marries in *London*, the whole Property is *ipso jure* her Husband's. It is assigned to him. The legal Assignment of a Marriage, operates without Regard to Territory all the World over. Feeling this, and seeing the predominant, the irresistible Necessity, in Point of Expediency, of adopting the Rule that Lord *Hardwicke* adopted in one of the Cases mentioned in the Papers, I, for one, am bent to the Necessity of giving Effect to the Principle, where a Departure from it would be attended with such inextricable Confusion. I remember well, that all my Doubts upon this Subject were removed by Sir *Ilay Campbell's* strong Argument, that without adopting this Principle, which the increasing Connexion between the two Countries rendered doubly necessary, it would be utterly impossible to extricate the Business of the Bankruptcy, under different Systems of Management. Many Questions would arise that would puzzle your Lordships beyond all Possibility of Solution, because there are no Elements to resolve them: they are truly Incompatibilities. The Laws of the two Countries are radically different, and you cannot blend them by any Contrivance. I admit at the same Time, that there is a great Difficulty attending all this, in so far as it places in the Power of a Debtor, to choose the Country where he shall become bankrupt: but what

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what are we to do with this Difficulty? Let the Legislature settle it. It is their Province and not ours. And here I must notice the Sort of Answer that is made on the Part of the Royal Bank, to many of the Arguments used on the other Side, viz. That they call upon us to exercise the Powers of Legislators, and not of Judges. But it appears to me, that this may be more truly said of the Arguments used by the Bank. They apply to us much more as Legislators than the other Party. Nothing can be more in this Way than to say, that though by Law the first judicial Transfer extends to both Parts of the Island, yet we are to be required to say, No, it shall not extend to *Scotland*. If we ask, why do you call upon us to do this? They answer, the Commission is collusive. Our Reply is, try this before the *Chancellor*; go to him and plead your Collusion. The Law of *England* and of *Scotland* is presumed to be equally good. If a Bankrupt is to have his Choice between the two, that may possibly be an Evil, but let the Legislature correct it. In the mean Time, we cannot quash a legitimate Proceeding already issued in *England*. If any Measure were to be adopted upon this Subject, it seems to me that the useless Subtilty of the Law of *England* should be corrected, which requires a special Act of Bankruptcy to be committed there, by each individual Bankrupt, before issuing the Commission against him. Why not award the Commission at once, as we do a Sequestration?

Lord BANNATYNE.

A great Deal has been said on the Part of the Royal Bank, with Regard to the Collusion that is said to have taken Place before issuing the Commission. But I think the Circumstance of the Bank withdrawing the Petition, is a sufficient Ground for holding this Allegation to be unfounded in Point of Fact. An Affidavit is presented to the *Chancellor* on the other Side, expressly denying the Collusion, which is acquiesced in; and therefore I am intitled to hold, that this proceeded from the Bank's own Sense of their Averment being erroneous. Another Question is, whether the *Edinburgh* and *London* Companies were the same, apparently they were different. They had different Trades, different Firms, and the one carried on Business in *London*, and the other in *Edinburgh*. But the Fact is, that they were not different, and of this we have now satisfactory Evidence, because we have the original Contract of Co-partnery, by which it is proved that they were originally, and have been all along, one and the same commercial Company. As they had a Domicile in both Countries, they were equally liable to the Operation of the Bankrupt Laws in the one Country, and in the other; that being the Case, how can the Line be drawn? Whoever is entitled to the Benefit of these Laws, has his Option to take the Benefit of the one or of the other. But if he take the Benefit of the English Commission, he cannot take the Benefit of the Sequestration;

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Sequestration; and if he take the Benefit of the Sequestration, there can be no Commission. It is a Maxim of universal Law, that Moveables follow the Person; and therefore it is clear, that these must be carried either by the Sequestration or by the Commission, according as the one or the other is first issued. Suppose a Sequestration were issued against a Man not domiciled in *Scotland*; this cannot receive Effect in *England*. In the same Manner, although a Commission of Bankrupt was ever so fairly obtained; yet if it be produced here, and we are satisfied that the Party is not domiciled in *England*, but in *Scotland*, I should hold in that Case, that we are not bound to give Effect to the Commission. With Regard to the Estates of these Companies, there is no Room for either of these Difficulties. But it does appear to me that there is a Difficulty: for here there is an Application for a Sequestration, not only of the Company Estates, but of the individual Estates. These Individuals were both domiciled in *Scotland*; they carried on two great Distilleries, which made no Part of the Company Funds; and I confess, I have very considerable Doubt, how far we ought not to sequestrate their individual Estates. But as this Application at present stands, I am for refusing the Petition.

Lord CRAIGIE.

In general I agree with all that has been stated by your Lordships. I think it right to refuse this Petition for Sequestration; at the same Time, I beg Leave to reserve my Opinion when another Case happens, which in Substance may be that which the present Case was said to be in the Bill Chamber. I think if this Case had come before me there, that I, as an Ordinary, would have awarded Sequestration, although it was said, that a Commission of Bankrupt had been issued in *England*: that might have been done for the very Purpose of evading a Sequestration. Suppose the Bankrupt had died immediately, so as he could have executed no Conveyances, the Estates would have remained without Management of any Kind, unless a Sequestration had been issued. To be sure, the Effect of a Sequestration would have been an after Question; and when the Assignees came and stated the Fact of the English Commission having been issued, then I should have decided which of the two should prevail. I have no Idea, that, *ipso jure*, an English Commission destroys the Operation of Diligence in *Scotland*.

Lord Justice CLERK.

This is a Case of very great Importance. I do not think it necessary to enter at large upon the Consideration of the preliminary Questions, because I agree entirely in the Observations which have been made. The Case stands now upon a totally different Footing from what it did in the Bill Chamber. Had I been called upon to say, whether as a Judge bound to give Effect to the Act of Parliament, by

1818.

The Royal Bank of *Scotland*, and *George Mitchel*, Esq. their Cashier, for their Behoof, Creditors of *Scott, Smith, Stein*, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of *John* and *Robert Stein*, individual Partners thereof, against *James Cuthbert* and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, carrying on Trade in *London*, under the Firm of *Stein, Smith*, and Co. and against the said *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, Respondents.

granting Sequestration, whenever the Conditions of the Statute, *prima facie*, appeared; I fairly confess, I should have felt great Difficulty in saying, how far I could have been justified in refusing to award that Diligence. But now, undoubtedly, the Case is in a very different Situation. We have now the Notoriety, the absolute Confession of the Bank, that they have been proceeding in *England*, upon the Foundation that the Commission has been issued. The Difficulty that I have in this Case is, that this is an Application not only for Sequestration of the Company, but of the Individuals who have been rendered bankrupt according to the Law of *Scotland*. But I do not think it necessary to go upon this Ground at present. We are now to decide the great Question, whether a Commission of Bankrupt issued with all due Form and Solemnity in *England*, ought or ought not to carry the Estates of Parties, who have been rendered bankrupt in *England*, but who have Effects in *Scotland*. I agree with all the Opinions given by your Lordships upon this general Point, because I conceive that such Opinions are only giving Effect to previous solemn Judgments. I therefore would not be disposed to do any Thing that can shake the Principles determined by these Judgments; and I should have thought the Bank would have seen the Expediency for their own Cause, of granting the general Point in the Argument. But the Question is, whether there is any Thing in this Case, either as to the Company or Individuals, that can create a Doubt with Regard to granting or refusing the Petition. I shall add nothing to the Statement of the inextricable Difficulties that would follow, from allowing two Systems of Management to go on *pari passu*. But the Circumstance that has always struck me was, whether there was or was not any Thing in the Conduct of the Parties; any Thing that could create a Doubt, as to the Application of the Principle. Now I fairly confess, after all I have heard, I remain of Opinion that it was not a Duty incumbent on Mr. *John Stein* to go out of: nor do I think that he ought to have quitted *Scotland* for the Purposes that have been mentioned (*a*). His Domicile was in *Scotland;* he was an ostensible Partner of a Scotch House; his large personal Property was in *Scotland*. But the Question that results from this is, whether your Lordships in any Documents before you, have sufficient Evidence that there was any Collusion between him and the Assignees; any Thing, in short, which can entitle you to interfere in this Case. I feel most certainly the Force of the Observations which have been made by such of your Lordships as have spoken upon this Point. The proper Place was to have gone before the *Chancellor;* and certainly the Parties did put in Averments upon their Part to this Effect. But we have

(*a*) Mr. *Clerk* on Behalf of Mr. *Stein*, stated, that he had never refused his Concurrence to a Sequestration here; that his only Object was to act for the general Benefit of his Creditors, and that in the Step he had taken, he had been guided by his Advice.

undoubted

1812.

The Royal Bank of *Scotland*, and *George Mitchel*, Esq. their Cashier, for their Behoof, Creditors of *Scott, Smith, Stein*, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of *John* and *Robert Stein*, individual Partners thereof, against *James Cuthbert* and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, carrying on Trade in *London*, under the Firm of *Stein, Smith*, and Co. and against the said *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, Respondents.

undoubted Evidence that the Petition was dismissed, and therefore the Trial of this Point, you are entitled to say, has already proceeded and been determined. The Difficulty stated by Lord *Robertson* is very strong, that your Lordships, acting ministerially, are bound to make your Orders conformable to the Statute. Now, the Petition prays for Sequestration of the whole Estate and Effects wherever situated; they say, indeed, that they will be content to take a Sequestration *quoad Scotland* only. But I really do not see how it is possible for your Lordships to get over the Difficulty. I must either grant or refuse the Prayer of the Petition, and however strong a View I may take of Mr. *Stein*'s individual Conduct, I feel that I cannot grant the Prayer of this Petition. The Commission of Bankrupt cannot be controlled by us; and there is no Doubt, certainly, that under this Commission the whole Effects of the Company and the four Partners fell under the Operation of the Bankrupt Law of *England*: but then, so far as *John Stein* was concerned, were not all the Proceedings that took Place just the Consequence of his voluntary Act in going to *England;* and I must say, in distinct Terms, evading the Diligence against him? Giving full Effect, therefore, to the general Principle, I apprehend, on the other Hand, unless it can be shown that you are barred by any Thing that has taken Place, you are bound to watch lest any Proceedings shall be carried on by Persons domiciled in *Scotland*, which can interfere with the Application of your own Rules of Law: for, with all the Respect that I feel to the Law of *England*, I am bound to direct my Conduct by the Law of *Scotland:* and surely it is a great Anomaly, that a Debtor, merely by stepping across the Boundaries of the two Countries, should have it in his Power most deeply to affect the Interests of his Creditors: especially as I believe that the Affairs of every Bankruptcy can be settled at much less Expense in *Scotland* than in *England*. As to the real Estates situated in *Scotland*, it is admitted, that without the private Conveyances nothing could have affected them. Now, seeing that all these were the individual Proceedings of Mr. *Stein;* that the Transactions were by a House carrying on Business in this City, of which he was the principal Partner; the Sequestration, so far as concerns his Estate, is a Part of this Case on which I have great Difficulty: but still, under the Act of Parliament, I feel that I cannot give Effect to the View which I have taken of the Case, because we cannot interfere with the *Chancellor*'s Commission.

Lord GLENLEE
Was present, but did not deliver any Opinion.

The Judgment of the Court was as follows:

Upon Report of Lord *Bannatyne*, and having advised the mutual Informations

1813.

The Royal Bank of *Scotland*, and *George Mitchel*, Esq. their Cashier, for their Behoof, Creditors of *Scott, Smith, Stein*, and Company, late Bankers in *Edinburgh*, and Petitioners for a Sequestration of the Estates of that Company, and of *John* and *Robert Stein*, individual Partners thereof, against *James Cuthbert* and Others, stating themselves to be Assignees under a Commission of Bankruptcy issued against *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, carrying on Trade in *London*, under the Firm of *Stein, Smith*, and Co. and against the said *Thomas Smith, John Stein, Robert Stein, James Stein*, and *Robert Smith*, Respondents.

formations for the Parties, and resumed Consideration of the Petition of the Royal Bank of *Scotland* and their Cashier, the Lords refuse the Desire of said Petition, dismiss the same, and decern.

Upon this Judgment, the Bank gave in a reclaiming Petition; which, on being advised with Answers, was unanimously refused.

The Bankrupts having obtained their Certificate, *John Stein* and *Robert Stein* presented Bills of Suspension (*a*), praying for Letters of Suspension, without Caution or Consignation of the Charges given in by the Royal Bank, upon the Bills of Exchange in Question, upon the Ground, that the Certificate was a Discharge of all Debts contracted prior to the Date of the Commission, whether English or Scotch. The Royal Bank objected, that the Certificate could only discharge Debts due to English Creditors, and could have no Effect in *Scotland*.

The Court were unanimously of Opinion, that the Certificate was a complete Discharge of every Debt that could be proved under the Commission, whether English or Scotch; and passed the Bills of Suspension, without Caution or Consignation.

The *Solicitor General*, Mr. *Bell*, and Mr. *Maconochie*, for the Royal Bank.

Mr. *Clerk*, Mr. *Cathcart*, Mr. *Cranstoun*, and Mr. *Skene*, for Messrs. *Strins* and the Assignees.

(*a*) *January* 20, 1813.

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18. A Creditor is not a competent Witness to prove the Act of Bankruptcy. *Ibid. but see the Note.*

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4. *A.* and *B.* Partners, gave a joint and several Bond to *C.*, who afterwards becomes indebted to *A.* *B.* becomes bankrupt; *C.* proves the Bond under the Commission, and then brings a joint Action against *A.* and *B.*, to which *B.* pleads his Certificate. *A.* being, by this Form of Action, precluded from setting off his separate Debt, applies for, and obtains, an Injunction against *C.*'s proceeding in the joint Action. *Bradley* v. *Millar*.

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2. In an Action brought by the Bankrupt against his Assignees, they must, independently of the Notice under Sir *Samuel Romilly*'s Act, be presumed to know, that the Bankruptcy is disputed, and ought to be prepared with Evidence to support it. *Ex parte Dick.* 51

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4. Assignees are not, under 5 *Geo.* II. c. 30, entitled to detain from the Bankrupt any Part of his Wearing-apparel, on the Ground of its being unnecessary; he himself being the Party to determine that, at the Risk of an Indictment: nor to refuse him the Inspection of his Books, previous to his last Examination, on the Ground that such Inspection is with a fraudulent Object. *Ex parte Ross.* *Page* 33

5. A Testator directs, that his Estate and Effects shall be laid out in the Public Funds, in the Names of Trustees, who are to pay the Dividends from Time to Time, into his Son's Hands, or to his Order and on his Receipt; to the Intent that the same, or any Part thereof, should not be grantable or assignable, by Way of Anticipation. On the Bankruptcy of the Son, his Assignees under the Commission are entitled to this Interest. *Brandon* v. *Robinson.* 197

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10. Although joint Creditors have no Right to vote in the Choice of Assignees under a separate Commission, yet the Court will, in some Cases, appoint Persons in the Nature of Assignees, to take Care of the Interest of the joint Creditors, and to use the Name of the Assignees, indemnifying them. *Ex parte Basarro.* 266

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16. An Assignee who has proved his Debt, and against whom, upon Petition here, an Action is directed to be brought, to try his Right to Property of the Bankrupt, alleged to have been fraudulently delivered to

to him, cannot dispute the Validity of the Commission: if he does, it is at the Hazard of his Proof. *Ex parte Jeeks.* *Page* 393

17. It is no Objection to an Application by a Messenger, that the Assignees may be directed to pay him his Bill of Fees, that he has neglected to make a Demand upon them till after final Dividend. They must be presumed to have known of his having such a Claim, and ought not to have distributed the Funds, without reserving sufficient to satisfy it.

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18. An Order for Payment of Dividends, declared, upon a Creditor's Petition for that Purpose, raises (like the Execution in the Action for which the Petition is substituted) a personal Responsibility against the Assignee. Thus, in this Case, an Assignee resisting the Payment of Dividends declared, upon the Ground of Usury, and retained the Amount of them at the Bankers of the Estate, who failed, was (not being able to expunge the Debt) ordered to pay the Dividends out of his own Pocket. *Ex parte Graham.* 456

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7. The Proceeds of short Bills ordered to be returned, unless upon an Enquiry it should appear, that with the Knowledge of the Party depositing them, or from the Habits of Dealing between the Parties, they were to be considered as Cash. The *Onus* of that Proof lies on the Banker. *Ex parte Sargeant.* 153, 155

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10. Bill, after Proof under a Commission against the Acceptor, was paid by the Drawer; who, after a Dividend, having arrested the Bankrupt for the Balance, and being also a Surety for him upon another Bill, was ordered to discharge him, and restrained from lodging any Detainer. *Ex parte Lobbon.* *Page* 219

11. Where indorsed Bills of Exchange are deposited by a Customer with a Banker, the latter has the absolute Power of disposing of them: and, in the Event of his Bankruptcy, though the Customer might have recovered such Bills as remained in Specie, subject to the Banker's Lien for the Balance of his Account; yet he cannot follow their Proceeds if they have been converted. Such absolute Property, however, may be qualified by Circumstances: as where the Banker is Agent for his country Correspondent to receive and pay Bills for him, with an Allowance for so doing; or where in an annual Account stated between them, the Banker has entered the Bills as the Property of the Correspondent: in the one Case, considering him as a Factor, and the Bills remitted for a particular Purpose, viz. to be received and carried to Account as Cash when due, and his Power over them limited to that Object: in the second Case, raising an express Declaration of Trust. Nor will it extend the Power so restricted to Agency, nor defeat such Declaration of Trust, that the Banker entered in his Books the Bills as Cash, or that he so considered them: his own Books not being Evidence for him, though they might be against him.

12. Short Bills upon a Bankruptcy are

are to be delivered up, subject to the Bankrupt's Lien, and indemnifying the Estate against the Engagements, on account of the Party claiming them; whether they are to be considered short or not, does not depend upon the particular Mode of entering them in the Banker's Books, but upon the Habits of Dealing between the Parties, and all the Circumstances together. The Mode of entering them is only Evidence. *Ex parte Pease*, 232. *Ex parte the Wakefield Bank.* *Page* 243

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3. It is not a Ground for staying a Certificate, that the Party having been before a Bankrupt, the Commission had omitted to certify that Fact according to Lord *Apsley*'s Order. 60

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6. Upon Petition to prove and stay a Certificate,

Certificate, the latter Part of the Application refused, unless a satisfactory Reason given for not having proved before. *ibid. Ex parte Dyson.*

7. That the Bankrupt's Accounts are in a slovenly State, is no Ground for staying the Certificate, unless he has refused his Assistance to explain or arrange them. *ibid. Ex parte Rawson.*

8. A Creditor who is the Executor of another Creditor, can only sign the Certificate once. *Ex parte Straccy.* *Page* 66

9. An Objection to the Proof of a Debt in Point of Form, is not sustainable as against the Certificate. *ibid.*

10. Certificate sent back, Creditors having signed before the Bankrupt had passed his last Examination. *Ex parte Brown.* 176

11. An Attorney's Bill for obtaining a Certificate must be signed and delivered a Month, before he can sue on it. *Collins* v. *Nicholson.* 119

12. Obtaining the Lord *Chancellor*'s Signature to a Certificate, is Business done in Court. *ibid.*

13. When Concealment of Property is established, the Great Seal will refuse the Commission: *Secus* when Concealment is only alleged upon Information and Belief. *Ex parte Joseph.* 184

14. Until it has been allowed by the Lord *Chancellor*, the Instrument certifying the Bankrupt's Conformity is not strictly a Certificate. *Ex parte Sawyer.* 141

15. Lottery Ticket of the Bankrupt, drawn a Prize after the Creditors had signed, but before the *Chancellor* had allowed the Certificate, held to belong to the Creditors. *ibid.* 142. N.

16. A Cognovit is not discharged by Bankruptcy or Certificate. *Wyborne* v. *Ross.* 112

17. Certificate stayed, till joint Creditors in a foreign Country should have an Opportunity of assenting or dissenting. *Ex parte Basarro.* 266

18. Certificate stayed, the Bankrupt having suffered a fictitious Debt to be proved. *Ex parte Laffert.* 330

19. The Court will not stay the Certificate upon a legal Objection (as losing at Cards, &c.), unless it be clearly established. *Ex parte Kennet.* 331

20. It is no Objection to the Certificate, that the Bankrupt has not obtained his Certificate under a former Commission. *Ex parte Thompson.* 285

21. A Commission under which the Certificate had been obtained, directed to be impounded in the Bankrupt Office, instead of being superseded, in Order not to destroy the Certificate. *Ex parte Tobin.* 431

22. A Certificate obtained under an English Commission, operates as a Discharge of the Debts of Scotch Creditors proveable under that Commission. *The Royal Bank of Scotland* v. *James Cuthbert.* 462

23. The fourth of several Signatures to

to a Certificate having been obtained by the Promise of the Bankrupt to pay that Creditor his Debt, such Certificate is void by Stat. 5 *Geo.* II. c. 30. s. 7. 11. though the Creditors who signed before and after the fourth were sufficient in Number and Value, without that one, for his Example might have induced the others to sign. *Phillips* v. *Dicas.* *Page* 345

24. A Deed of Composition framed only for the joint Creditors of two Bankrupts, and which was not signed or accepted by the separate Creditors of one of the Bankrupts, is not such a compounding with Creditors as will, within the Statute 5 *Geo.* II. c. 30 s. 9. limit the Effect of the Certificate to the Protection of the Person only, and not of the future Property of the Bankrupt. *Norton* v. *Shakespeare.* 347

25. The Defendant becomes bankrupt, obtains his Certificate, but omits to plead it. His Bail becomes fixed. The Court will not set aside the Proceedings. *Clarke* v. *Hoppe.* 353

26. If a Commission issues against a Man by a wrong Name, under which he obtains his Certificate, a Plea of Bankruptcy to an Action brought against him by his right Name will be supported by Production of the Certificate, and Proof that he is the Person against whom the Commission issued. *Stevens* v. *Elizée.* 360

27. Where one Defendant pleads his Bankruptcy, and the other the general Issue, the former cannot, on Proof of his Certificate, be made a Witness to the latter. *Currie* v. *Child.* *Page* 360

28. Bankrupt's Certificate obtained by Imposition practised upon the Great Seal, revoked, of no Injury to Persons subsequently dealing with the Bankrupt on the Face of it. A Reference directed to ascertain the Fact. *Ex parte Tallis.* 371

29. No Affidavits can be admitted against the Allowance of a Certificate, but such as have been filed in the Office at the same Time with the Petition, or are necessary in Reply. It is a general Rule, that a Petition to stay a Certificate if dismissed is dismissed with Costs, unless the Bankrupt by Misconduct has forfeited that Privilege. *Ex parte* The Bank of *Scotland.*—In the Matter of *Smith, Stein,* and Co. 375

30. Whether Affidavits are necessary in Reply is for the Decision of the Court upon hearing the Petition. 378. N.

31. The Rule that a Petition to stay a Certificate, if dismissed, will be dismissed with Costs, is dispensed with if there has been Misconduct in the Bankrupt. Misconduct to stay a Certificate must be Misconduct under the Bankruptcy. *Ex parte Gardner.*—In the Matter of *Aspinall.* 377

32. Equity will not restrain by Injunction

junction farther Proceedings at Law, upon a Verdict obtained through the Defendant's Neglect to produce his Certificate in Evidence. *Lingard* v. *Hibbertson.* *Page* 459

33. Sending back Certificate to Commissioners to be re-considered, *Quære.* *Ex parte Bangley.* 187

COGNOVIT.

See CERTIFICATE.

COMMISSION.

1. Unless there be a Competition for a Town or Country Commission, the Court will not interfere to direct either one or the other. *Ex parte Bowdler.* 48

2. Where there is such a Competition, and Application is made to the Court, Notice should be given to the opposite Party. *ibid.*

3. A Commission of Bankrupt cannot be supported, on the Petition of one of two Partners, to whom a joint Debt is due. 4. N.

4. The Evasion of Lord *Rosslyn's* Order, requiring the Names of two Barristers to be inserted in a country Commission, is a Ground for superseding it. *Ex parte Harbin.* 58

5. A Barrister who cannot attend for the Twenty Shillings allowed by 5 *Geo.* II. c. 30. s. 42. is not within the Order. *ibid.*

Under a Commission against Country Bankers, auxiliary Commission directed to the Place of their Bank, to take the Proof of their Small Notes. *Ex parte Perry.* *Page* 12

6. But Liberty to examine the Bankrupts under it refused. *Ex parte Scott.* *ibid.*

7. Although there be a Trading, a Debt, and an Act of Bankruptcy; yet, if the Commission be taken out for a Purpose foreign from its Object, as to work a Dissolution of a Partnership, it is supersedeable at the Costs of those who take it out. *Ex parte Brown.* 151

8. A first Commission to render void a second, must be a Commission in legal Operation. *Ex parte Bullen.* 134

9. The Lord *Chancellor* refused to stay Proceedings under a Commission *not opened*, upon an Allegation that there was no petitioning Creditor's Debt: the Commission and the *Adjudication* of Bankruptcy being a Matter of Right under the Act of Parliament. *Ex parte Lanchester.* 220

10. To render the Proceedings under a Commission of Bankrupt Evidence pursuant to Sir *Samuel Romilly's* Act, it is enough to shew, that they are produced from the Custody of the Solicitor to the Commission, or to prove the Handwriting of one of the Commissioners before whom they were taken. *Collinson* v. *Hillear.* 221

11. Petition to have the Teste altered, and a Commission resealed, under which no Proceedings had taken

taken Place, in order to let in a subsequent Act of Bankruptcy, dismissed. *Ex parte Cheesewright.* *Page* 228

12. Maliciously suing out a Commission. *See* ACTION. BOND.

13. A Tenant having committed an Act of Bankruptcy in *October* 1810, upon which a Commission issued on the 21st *January* 1811, and the Sheriff having on the 7th of *January* levied an Execution, under which he sold the Goods of the Tenant, on the 21st and 22d of *January*, for £520, and out of that Sum paid the Landlord £140, for one Year's Rent in Arrear: held, in an Action for Money had and received, brought by the Assignees of the Bankrupt's Tenant, against the Sheriff, to recover the whole Amount of the Sum levied, that the Property in the Goods being changed by the Act of Bankruptcy and Commission, and transferred to the Assignees, it lay upon the Sheriff to prove, that he had paid over the Money to the Landlord and execution Creditor, before he had Notice of the Commission issued; and not giving such Proof, that he was liable for the Amount to the Assignees, and that he was not entitled to deduct £140, paid over to the Landlord, as for the Year's Rent in Arrear, under the Statute 8 *Anne*, c. 14. s. 1. A Commission of Bankrupt not being an Execution within the Meaning of the Statute, which directs that no Goods upon demised Premises shall be taken by Virtue of any Execution, unless the execution Creditor shall, before the Removal of such Goods from off the Premises, pay to the Landlord all Arrears of Rent not exceeding a Year's Rent. *Lee* v. *Lopes.* *Page* 342

14. If a Commission issues against a Man by a wrong Name, under which he obtains his Certificate, a Plea of Bankruptcy to an Action brought against him by his right Name, will be supported by Production of the Certificate, and Proof that he is the Person against whom the Commission issued. *Stevens* v. *Elizée.* *Page* 360

15. If a Commission of Bankrupt has passed the Great Seal, although it never be opened or acted upon, it has issued within the Meaning of 49 *Geo.* III. cap. 121. s. 2. so as to be Notice of a prior Act of Bankruptcy. *Watkyns* v. *Maund.* 361

16. If a Commission is clearly proved to be the Commission of the Bankrupt, it must be superseded; but it is no Objection to it that it has been taken out to defeat an Execution. *Ex parte Gardner.*—In the Matter of *Aspinall.* 377

17. Although a Commission having become supersedeable for Nonprosecution within 28 Days, according to the Provision of the General Order of the 26th *June* 1793, has been actually superseded; yet a second

second Commission is not, as a Matter of absolute Right, to be granted to another Solicitor; but under Circumstances, the first Commission may revive. *Ex parte Freeman.* *Page* 380

18. Where there is a *bonâ fide* Intention to prosecute a Commission, the General Order may be dispensed with upon Accident, Sickness of Commissioner or Witnesses, or Adjudication too late for the Gazette; but strict Proof required of a *bonâ fide* Intention to prosecute. *ibid.*

19. A second Commission, which had issued upon a Supersedeas of a former one, for Non-prosecution within the 28 Days, was directed to be superseded, and the first Commission to proceed, on the Ground that there was a true *bonâ fide* Intention of executing the first, delayed only by the Refusal of the Witness, who could prove the Act of Bankruptcy, to attend the Commissioners for that Purpose, and Notice to the Solicitor who struck the second Docket, that a Petition had been presented to compel the Attendance of that Witness, and that the Commission was intended to be prosecuted. *ibid.*

20. An Instrument, although the Great Seal has been affixed to it, is inoperative while it remains in the Hands of the Lord *Chancellor*; but a Delivery to a Messenger, although the Instrument is not taken out of the Bankrupt Office, is a Delivery to the Party. *ibid.*

21. A Creditor is entitled to a Commission of Bankrupt as a Matter of Right, yet it must be the Commission of the Creditor and not of the Bankrupt. *Ex parte Downes. Ex parte Ansley.* *Page* 398

22. Sales, &c. having taken Place under a separate Commission, the Court in Preference to superseding it, yet, in Order to give Effect to a subsequent joint one, directed it to be impounded in the Office of the Secretary of Bankrupts. *Ex parte Rowlandson.*—In the Matter of *Joseph Ancell*; and also in the Matter of *George* and *Joseph Ancell.* 416

23. Although a second Commission, where a former one is in Operation against any of the same Parties, is void; yet, where the Convenience of administering a partnership Fund requires it, and it can be done without Prejudice to Transactions which have taken Place under the first Commission, the Court will so dispose of the first Commission, as to prevent its being an Impediment to the Prosecution or Validity of the second. In this, a Case of four co-existent Commissions against a Partnership, and the Individuals of it, a very special Order was made, giving Validity and Effect to that under which the Affairs of the Bankrupts could be most conveniently administered. *Ex parte Mason; ex parte Rawson.* 423

24. Commission superseded on the Ground of Delay in opening it.

The Bond not assigned, because that is conclusive at Law, and there may be a better Remedy by Action on the Case. *Ex parte Fletcher.* *Page* 454

25. A Commission of Bankrupt vests in the Assignees under it all the Property of the Bankrupt, wherever situate, precluding Creditors in *Scotland* from attaching by Sequestration their Debtor's Property, remaining or situate in that Country, and from administering it in a Course of Distribution under such Process of Sequestration; and, although the Commission does not in itself operate upon the heritable Property of the Bankrupt in *Scotland*, yet it imposes upon him a legal Obligation to execute the proper Conveyance, and do the necessary Acts for transferring it to his Assignees. Royal Bank of *Scotland* v. *Cuthbert.* 462

26. Semble, that the Converse of the above Proposition applies to the Case of a Sequestration in *Scotland*, and that it would preclude English Creditors from suing out, or sustaining a Commission against a Debtor, who was the Subject of an antecedent and operative Sequestration. *ibid.*

27. Whether the Commission or the Sequestration is to be preferred as the Mode of administering the Debtor's Effects, depends upon their Priorities. *ibid.*

Thus, where four Traders carried on Business in Co-partnership, having a House of Business in *London*, and another in *Edinburgh*, and two of the Partners, till the Bankruptcy, resided in *Edinburgh*, and severally carried on Trade there, distinct from the Co-partnership and the Rest of the Partners residing in *London*, a Commission of Bankrupt against the Partnership was held to be a complete Bar to a Sequestration, either against the Property of the Partnership in *Edinburgh*, or the personal or real Property of the separate and resident Traders. *Page* 462

Whether or not the Commission is a valid Commission, is a Question for the Decision of the Lord *Chancellor*, the Courts of *Scotland* not having Jurisdiction upon that Subject; but if they were satisfied, that the Party subjected to the Commission was domiciled in *Scotland*, and had not been domiciled in *England*, *quære*, whether they would be bound to give Effect to it? *ibid.*

Dubitante, Lord *Bannatyne*, whether the Sequestration ought not to be awarded, *quoad* the separate Estates of the two resident Traders, *John* and *Robert Stein*. *ibid.*

Sentiente, Lord *Cragie*, that the Sequestration ought to have been awarded by the Lord Ordinary in the first Instance, reserving the Effect of it for after Consideration. Lord Justice *Clerke* expressed a similar Doubt. *ibid.*

COMMITMENT.

See HABEAS CORPUS.

COMPOSITION.

See PROOF 16. 20.

1. A Person dealing with another for a Composition, shall not be bound by a Concealment, or Representation of the Amount of his Debt, if the Plan, under which the Concealment or Representation takes Place, is not carried into Effect. *Ex parte Oakley.* *Page* 138

2. A Deed of Composition, framed only for the joint Creditors of two Bankrupts, and which was not signed or accepted by the separate Creditors of one of the Bankrupts, is not such a compounding with Creditors, as will, within the Statute 5 *Geo.* II. c. 30, s. 9, limit the Effect of the Certificate to the Protection of the Person only, and not of the future Property, of the Bankrupt. *Norton* v. *Shakespeare.* 347

COSTS.

If a Person, aware that a Commission supersedeable under Lord *Rosslyn's* Order is to be proceeded in, takes out another, it will be superseded at his Costs. *Ex parte Sanden.* 85

See COMMISSION. CERTIFICATE. PRACTICE.

CREDITORS.

See ASSIGNEES.

D.

DEED.

See ACT OF BANKRUPTCY.

DEPOSIT.

See LIEN.

DIVIDEND.

1. It is discretionary in the Lord *Chancellor* to postpone the Dividend beyond the Time limited by Stat. 5 *Geo.* II. c. 30. s. 33. But a Petition by Creditors of surviving Partners, that the Dividend might be postponed until those who were also Creditors of a deceased Partner, and had filed a Bill against his Representatives for an Account of his Assets, and Payment of their Debts, should have gone in under the Decree, was dismissed for Want of Equity. *Ex parte Kendal.* *Page* 71

2. Assignees have no Means of restricting the Payment of Dividends ordered, but by Petition to expunge the Debt. *Ex parte Whiteside.* 319

3. Upon a Petition for Payment of Dividends declared, the Order of Dividend is conclusive; and unless the Assignees succeed in impeaching the Debt, they are personally responsible for the Dividend. *Ex parte Graham.* 456

DOCKET.

See PRACTICE 9. 12.

E.

ELECTION.

See ACTION. ASSIGNEE.

Not set aside upon the Ground of Mistake in the Value of the Security. *Ex parte Downes.* *Page* 96

EQUITABLE MORTGAGE.

See LIEN.

EVIDENCE.

See COMMISSION. ACTION. ACT OF BANKRUPTCY.

1. The Commission and Proceedings are conclusive Evidence of the Bankruptcy, unless Notice be given under Sir *Samuel Romilly's* Act. *Humphries* v. *Coggan.* 226
2. *Semble,* that on an Indictment against a Bankrupt for Perjury before the Commissioners, it is necessary to give strict Evidence of the Trading, petitioning Creditor's Debt, and Act of Bankruptcy. *Rex* v. *Punshon.* 223

F.

FOREIGN ATTACHMENT.

213

H.

HABEAS CORPUS.

If Commissioners think that the Bankrupt has not answered satisfactorily upon his Examination, they are bound to commit him; but he may be discharged, either upon his answering satisfactorily to them at a subsequent Time, or upon his Answer already given, being deemed satisfactory by such other Jurisdiction as he shall be brought before, by Writ of *Habeas Corpus.* *Ex parte Oliver.* *Page* 407

It is not sufficient that the Bankrupt answers fully, roundly, and positively; it is necessary that he should answer credibly and satisfactorily. *ibid.*

Upon a Question of Discharge from Commitment by Commissioners, the Lord *Chancellor* will not go out of the Return to the Writ of *Habeas Corpus,* into the Conduct of the Bankrupt under the Bankruptcy, or into any Examination other than that stated in the Return to the Writ. *ibid.*

The Bankrupt must answer every lawful Question; and although he is not bound to criminate himself, yet, if he refuses to account for any Part of his Effects, his Refusal subjects him to a Commitment. *ibid.*

See the Cases of COMMITMENT collected. 415. N.

I.

INTEREST.

Interest out of the Surplus of a Bankrupt

rupt Banker's Estate, refused upon his Promissory Notes payable on Demand; as not being Debts carrying Interest, either by Contract, or on the Face of them. *Ex parte Cocks.* *Page* 317

Wherever there is a written Contract for a Sum of Money payable upon Demand, or upon a Day certain, Interest is payable from the Time of the Demand made, or from the fixed Period of Payment. *ibid.* N.

Where there is a Surplus of the Bankrupt's Estate, Creditors are not entitled to Interest upon Debts, unless it has been provided for by Contract, either express, or implied; and upon Bonds, not beyond the Penalty. An implied Contract to pay Interest may be raised from the Dealings between the Parties: as where the Debtor has been in the Habit of paying Interest upon such or similar Securities. Interest is computed and given upon Bills of Exchange, in an Action at Law, in the Nature of Damages, not strictly as Interest; and for a Breach of the Contract, not in Pursuance of it. *Ex parte Williams.* 399

INTERPLEADER (*Bill of*).

Injunction ordered upon an interpleading Bill, filed by a Debtor against the Bankrupt and his Assignees; but the Court will not suffer a Bankrupt, by Means of such a Bill, to try the Validity of his Commission. *Lowndes* v. *Cornford.* *Page* 180

J.

JURISDICTION.

See MESSENGER 3.

1. *A.* obtains Money from *B.* on the Security of Goods consigned to *B's* House in *America*, and shortly after becomes Bankrupt. *B.'s* Agent in *America*, ignorant of the Advances made, and of the Bankruptcy, remits Bills for the Proceeds of the Goods to *A.* *A.* delivers them to a Person to get them accepted, who hands them over to *B.* Petition, that *A.*, or the Assignees, might be directed to indorse them, dismissed with Costs, on the Ground of Jurisdiction. *Ex parte Hall.* 13
2. Whatever it is necessary to decide, collaterally to the Question of Proof, will give Jurisdiction in Bankruptcy. *Ex parte Rowton*, 15. *Ex parte Pease.* 232
3. No Jurisdiction to compel a Bankrupt to execute a Power in Favor of his Creditors. *Thorpe* v. *Goodall.* 270
4. But there is Jurisdiction to compel him, after he has passed his last Examination, to deliver up Papers in his Possession, belonging to the Estate, and to attend the Commissioners.

- sioners. *Ex parte Bradley.* *Page* 202
5. A Stranger to the Commission, applying for and obtaining an Order in Bankruptcy, brings himself within the Jurisdiction. *Ex parte Bozannet*, 181. *Ex parte Pease*, 232. *Ex parte Hardenberg.* 204
6. If the Object of his Petition merely is, that the Commission may be superseded, or the Certificate stayed, *Quære. Ex parte Hardenberg.* 204
7. The Court has not Jurisdiction to appoint a Receiver upon Petition in Bankruptcy. *Ex parte Tapper.* 179
8. Or unless a Cause is depending, except in the Case of Idiots and Lunatics. *ibid.* N.
9. No Jurisdiction in Bankruptcy to order an infant Heir of a deceased Assignee to convey, as an infant Trustee, the Estates of the Bankrupt, vested in him by the Decease of his Ancestor. But the Petition was amended, and the Order made, under the Stat. 7 *Ann.* c. 19. *Ex parte Beddam.* 310
10. Jurisdiction to order the Trustees, in a Deed of Assignment, to produce it before the Commissioners, for the Purpose of proving an Act of Bankruptcy. *Ex parte Cawkwell.* 313
11. Jurisdiction in Bankruptcy, to order Assignee to pay Messenger's Bill of Fees. *Ex parte Hartopp.* 449
12. The Court will not, (sitting in Bankruptcy) on Behalf of the Sureties of a Bankrupt, direct a Sale of mortgaged Premises, for Payment of a Debt secured by Recognizance. *Ex parte Usher.* *Page* 366
13. Under a separate Commission against one of two Partners, the Bankrupt having paid twenty Shillings in the Pound to all his Creditors, obtained an Order for the Payment of the Surplus to him, and the same was accordingly paid to him. Held that his Partner was entitled to apply by Petition in the Bankruptcy, for an Account of such Surplus, and for Payment of his Proportion of it, and that the Court had Jurisdiction to make the Order required. *Ex parte Lanfear.*—In the Matter of *Holland.* 442

L.

LANDLORD AND TENANT.

See COMMISSION. ASSIGNEE.

LIEN.

1. Title Deeds, deposited to secure £4000, extended by Parol, to cover subsequent Advances. *Ex parte Langston.* 26
2. On Furniture. 306
3. No Lien on Proceedings. *Ex parte Bullen*, 134. *Ex parte Sandison.* 275
4. Books referred to by the Bankrupt on his last Examination, form Part of

of the Proceedings. *Ex parte Hardy.* *Page* 395

5. A Transfer of Deeds from a Depositary, in whose Possession they constituted an equitable Mortgage, to the Person who discharged his Debt, not considered as an Assignment from him, so as to over-reach an Act of Bankruptcy, against the express Words of a Defeazance on a Warrant of Attorney, stating that the Deeds had been deposited by the Bankrupt himself. *Ex parte Coombe.* 268

6. Under a joint Commission of Bankruptcy, the separate Estate of one Partner, has a Lien on the other's Share of a Surplus of the joint Estate, in respect of a Debt proved under Bills drawn in the Name of the Firm for a separate Debt; and may come in with the other separate Creditors for the Deficiency. *Ex parte King.* 212

7. Lien on short Bills in the Hands of a Banker. *See* BILLS OF EXCHANGE.

8. Lien created by Deposit of Copies of Court Rolls. *Ex parte Warner.* 286

9. No Lien upon Deposit beyond the first Depositary. *Ex parte Whitbread.* 299

10 Equitable Mortgage held to be created by Delivery of Deeds, for the Purpose of preparing a legal Mortgage. *Ex parte Bruce.* 374

11. No Objection to Deposit of Lease, that it contains a Covenant against assigning without Licence. *Ex parte Baglehole.* *Page* 432

M.

MARRIAGE

Solemnized in *Scotland* without Banns or Licence is good; and a Bond given by a Father, by Way of Settlement, previous to a Re-solemnization of such Marriage here, not sustained against Creditors under his Commission. *Ex parte Hall.* 30

Trader by Settlement on Marriage in Consideration of £1000, the Wife's Fortune, conveyed his House to Trustees to his own Use, till Death or Bankruptcy; then, in either Event, to raise £1000 for her separate Use. This is a fair and valid Settlement, in Nature of a Mortgage, to secure the Wife's Fortune, on Bankruptcy of the Husband. Application by his Assignees for an Injunction, to restrain Trustees from recovering the House at Law, refused. Marriage Settlement of Trader, not securing the Wife's Fortune in the Event of Bankruptcy, the Intention appearing to be so, amended accordingly. *Higginson* v. *Kelly.* 368

A Trader cannot on Marriage secure a Provision out of his Property

perty for his Wife, in the Event of Bankruptcy, in Prejudice to the Creditors. *Page* 368, *and see the* Cases in the Note.

MESSENGER.

1. Obstructing a Messenger in the Execution of his Warrant, is a Contempt of the Great Seal. *Ex parte Page.* 1
2. *Quære,* Whether a Messenger, having been in Possession under a Warrant, and abandoned it, the Warrant is not spent. *ibid.* 2
3. No Jurisdiction in Bankruptcy to order Goods, seized by the Messenger, to be delivered up to a Person claiming them as his. *Ex parte Craggs.* 25
4. Payment of Fees to. *See* ASSIGNEES. JURISDICTION.

N.

NOTICE.

Payments protected; the Party paying not having Notice of Act of Bankruptcy, &c. *Coles* v. *Robins,* 225. *Prickett* v. *Down.* 224

Notice of Insolvency, what. 362. N.

O.

ORDER AND DISPOSAL.

1. The Stat. 21 *Jac.* I. c. 19. s. 11. transfers to the Assignees of a Bankrupt such Goods as, by the Consent of the Owner, the Bankrupt has in his Possession at the Time of his Bankruptcy; therefore where the Purchaser of Goods lying at a Wharf in the Name of the Seller, received from him at the Time of the Sale, an Order on the Wharfinger for the Delivery of the Goods, but suffered them to remain in the Name of the Seller for several Months after, during which Time the Seller disposed of a Part thereof; but, upon Notice of the Seller's Insolvency, the Purchaser carried the Order to the Wharfinger, and had the Goods transferred into his own Name, and nine Days after that the Seller became Bankrupt: held, that the Assignees of the Bankrupts were not entitled to these Goods, for there was a complete Transfer of Possession before the Bankruptcy.

Quære, Whether the Statute would at any Rate have extended to Goods the joint Property of two Traders, but deposited at the Wharf in the Name of one only, who after such Sale in his own Name, became Bankrupt. *Jones* v. *Dwyer.* *Page* 339

2. Short Bills are not within the Statute. *Vide* BILLS OF EXCHANGE.

P.

PARTNERSHIP.

See COMMISSION. CERTIFICATE. DIVIDEND. PROOF. LIEN.

Interest

Interest of Partners in Partnership Property. *Vide Page* 213 *to* 218

PETITION.

See PRACTICE.

PETITIONING CREDITOR.

1. Bills of Exchange to the Amount of £100, drawn before an Act of Bankruptcy, but becoming due afterwards, are a sufficient petitioning Creditor's Debt. *Brett* v. *Levett.* 102
2. A Solicitor may sue out a Commission upon his Debt for Costs, without, as in the Case of an Action, having delivered his Bill one Month previous thereto; but it is quite of course, after the Commission, to refer such Bill to the Master to be taxed. *Ex parte Howell.* 312
3. Petitioning Creditor's Debt, proved by an Award, under a Deed of Reference of Accounts between Partners, of a separate Debt of above £100 due from the Bankrupt to the petitioning Creditor: held, that Proof of the Execution of the Deed by the petitioning Creditor, and the Bankrupt, was insufficient, without proving also the Execution by the other Partners. *Antram* v. *Chace.* 344

PRACTICE.

See COMMISSION.

1. On a Reference of a Matter in Bankruptcy to the Master, Affidavits which might have been read at the Hearing of the Petition in Court, may be received in Evidence by him. *Ex parte Heywood.* *Page* 45
2. Joint Creditors, with the Exception of a joint petitioning Creditor, can prove under a separate Commission, only for the Purpose of assenting to, or dissenting from, the Certificate, and receiving a Dividend out of the Surplus, after the Satisfaction of the separate Creditors. But if there are no joint Effects, and no solvent Partner, or no separate Debts, or the joint Creditors will pay the separate Creditors twenty Shillings in the Pound, they may then vote in the Choice of Assignees, and go at once against the separate Estate. 21. N.
3. The Examination of a Bankrupt before Commissioners is not admissible Evidence upon the Hearing of a Petition, unless Notice has been given of an Intention to make use of them. *Ex parte Stracey.* 68
4. Two Commissions against the same Bankrupt, and distinct Assignees under each: upon a Petition that they might elect either to take or reject a Lease. An Order was made upon both, subject to the Question as to which Commission should be sustained. *Ex parte Pomeroy.* 57
5. Demurrer to a Bill allowed: the Proceeding proper to the Object of the Suit being by Petition in Bankruptcy. *Saxton* v. *Davis.* 79
6. Commission resealed to rectify a clerical Error; but a new Docket and

and Bond ordered, *Ex parte Sutton.* *Page* 85

7. Two of three Assignees direct the Solicitor to the Commission to give up the Proceedings to another. The third Assignee, not concurring, has a Right to know whether such Change will be beneficial to the Estate. 207

But *semble* if the third Assignee has not a satisfactory Reason for withholding his Concurrence, he will be liable for the Costs of an Application to the Great Seal for the Solicitor's Removal. *Ex parte Scruby.* *ibid.* N.

On the Bankruptcy of a Petitioner his Assignees must prefer a new Petition. 197

8. Affidavit sworn before a Master extraordinary, who was Solicitor to the Commission, not allowed to be read. *Ex parte Brockhurst.* 145

9. A Solicitor having struck a Docket, within the regular Time gave in Commissioners Names, and ordered the Commission to be sealed; but through some Misunderstanding the Fees were not left, and the Direction was not complied with. Another Solicitor then struck a Docket against the same Bankrupt. The Lord *Chancellor* held, that it would be construing the General Order of 29th *December*, 1806, too strictly, not to let the first Commission issue; but directed the other Solicitor to be paid his Expenses. *Ex parte Evans.* 162

10. A Witness cannot be compelled to attend Commissioners upon Motion; the Application must be by Petition. *Ex parte Morgan.* *Page* 192

11. Plaintiff becomes bankrupt: upon Motion to dismiss the Bill for Want of Prosecution, Assignees allowed a Month's Time to adopt the Suit. *Mumford* v. *Randall.* 196

Upon the Bankruptcy of a Petitioner, Assignees must present another Petition. *ibid.* N.

12. It is the Practice at the Office to allow a second Docket to be struck against the same Person, upon a Variation in the Name. *Ex parte Ward.* 314

13. An Order by the Lord *Chancellor* to enlarge the Time for a Bankrupt's surrendering to pass his last Examination must be made six Days before the Expiration of the forty-second Day. *Ex parte Du Freme.* 311

14. The General Order, directing Commissions to be sealed at the next Seal, within seven Days, means the next immediate Seal, without any Discretion on the Part of the Bankrupt Office to defer it till another Seal within the seven Days. In the Matter of *Lambert.* 258

15. The Lord *Chancellor* will not stay Proceedings under a Commission not opened; the Adjudication being a Matter of Right. *Ex parte Lanchester.* 220

16. A Town Commission is supersedeable at the End of fourteen Days, and a Country Commission at

at the End of twenty-eight Days, from their Dates, if not previously prosecuted. *Page* 333

17. A Solicitor who has neglected to prosecute one Commission, cannot sue out another without Leave of the Court. *ibid.*

18. The Assignees cannot refuse to pay Dividends ordered: but having a reasonable Objection, should petition to expunge the Debt. *Ex parte Whiteside*, 319. *Ex parte Graham.* 456

19. To a Petition by a petitioning Creditor, that the Assignees may, out of Funds in their Hands, pay the Solicitor's Bill upon the Choice of Assignees, and which had been taxed by the Commissioners, it is a sufficient Objection, that the Commissioners have allowed Charges in which it ought to be expunged. *Ex parte Thelwall.* 397

20. If a Creditor, believing a Commission to be invalid, does not prove under it; but, acting adversely, declares to the Bankrupt and his Friends, that he means to petition for a Supersedeas, and to stay the Certificate, unless his Debt be paid or satisfied; that is not such a tampering as will operate in Bar to his Petition. *Ex parte Paterson.* 402

21. Defendant allowed to withdraw his Plea, and to replead, after giving Notice of his Intention to dispute the petitioning Creditor's Debt, &c. *Radmore* v. *Gould*, 122. And the same Practice adopted in Equity, *Berks* v. *Wigan*, 1 *Vesey* and *Beames*, 220.

22. A Commission of Bankrupt against the Petitioner had been superseded at the Costs of the Creditor who sued it out. The Petitioner brought an Action on the Case, and took out a Summons before a Judge at Chambers, for Liberty to inspect the Commission, &c. The Judge thought he had no Authority to make the Order. The Petitioner then presented his Petition for the same Purpose, and obtained an Order, but under the Circumstances, with no Costs on either Side. *Ex parte Warren. Page* 276.

23. Under a separate Commission, the separate Estate is entitled to be reimbursed, out of the joint Estate, Expenses incurred in recovering Property for the Benefit of the joint Creditors. *Ex parte Rutherford.* 201

24. Certificated Bankrupt's Name struck out of Proceedings in a joint Action against him and others, unless indemnified. *Ex parte Read.* 460

25. Petition to remove a bankrupt Assignee, &c. dismissed with Costs. *Ex parte Watts.* 436

PROOF.

See MARRIAGE 1.

1. *A.* being an Indorsee of *B.*, *C.*, and Co.'s Acceptances for £1364, sues out a separate Commission against *B.* At the Time of suing out the Commission, *D.*, the Person for

for whom *A.* had discounted the Acceptances, by Payments on Account reduced the Debt to £420. *A.* is entitled to prove for the whole Amount; and for all that is received above the £420 will be a Trustee for *D.* *Ex parte De Tastet.* *Page* 10

2. *A.*, the Payee of a Bill of Exchange, indorses it in blank, and delivers it to *B.*; *B.* writes above the blank Indorsement, pay *C.* or Order; *B.* takes up the Bill after a Commission of Bankrupt has issued against the Acceptor. Petition that he may be at Liberty to prove it under the Commission, dismissed with the Offer of a Case. *Ex parte Isbester.* 20

3. A Person giving Cash for a Bill, without the Indorsement of the Person from whom he takes it, cannot prove it under his Commission. *ibid* 24 N.

4. *A.*, in 1808, accepts Bills for *B*'s Accommodation; *B.* becomes bankrupt, having paid away the Bills; and *A.* takes them up without having received Value. *A.* (the Debt not being proveable under the Commission) brings an Action against *B.*, and recovers his Principal, Interest and Costs. He then sells his Debt, and assigns the Judgment. The Assignee of this Judgment is, under Stat. 49 *Geo.* III. c. 121, s. 8, entitled to prove the original Debt under the Bankrupt's Commission, and to receive a proportionate Dividend; and the judgment Debt, though greater than the original, will be barred by the Certificate. *Ex parte Lloyd.* *Page* 4.

5. Proof refused upon Bills drawn in *London*, without the necessary Stamp, but on the Face of them appearing and purporting to be drawn at *Amsterdam*; and the Holders had received them for Value, and without Knowledge that they were not drawn at *Amsterdam*. *Ex parte Manner.* 68

6. The Proof of a Debt being refused, the Creditor enters up Judgment in an Action brought against the Bankrupt, and takes out a *Ca. Sa.*, in order to fix the Bail. The Bankrupt surrenders himself in Discharge of them. The Creditor (his Debt being established) held not to be precluded from resorting to the Commission. *Ex parte Arundel.* 143

7. A Creditor having taken out Execution against the Bankrupt's Effects, gave up the Proceeds of it, received from the Sheriff, under an Agreement with the Assignees, that he should come in with the other Creditors for the Balance due to him. Such Agreement held to mean a *proveable* Balance, and not to let in the Debt if effected with Usury. *Ex parte Bangley.* 168

8. The Bank of *England* admitted to prove by their Clerk, without a Power of Attorney. *Ex Parte* The Bank of *England.* 142

9. Where one Partner carries on a distinct Trade, the other Partner may

may prove under his Commission a Debt for Goods sold him by the Firm. *Ex parte Hesham. Page* 146

10. The Commissioners for issuing commercial Exchequer Bills, admitted, by their Secretary, to prove the full Amount of their Principal, with Interest up to the complete Payment of the Principal, in Preference to all other Creditors of the Bankrupt. *Ex parte Holden.* 173

11. Proof upon an Award, made after Act of Bankruptcy, expunged. *Ex parte Kemshead.* 149

12. A Covenant in a Marriage Settlement, to transfer Stock into the Names of Trustees, upon receiving one Month's Notice, with Liberty to the Trustees to forbear giving the Notice during the Life of the Covenanter, is a contingent Debt, not proveable under the Bankruptcy; the Bankruptcy not being equivalent to, or superseding the Necessity of, Notice. *Ex parte Alcock.* 323

13. A Petition to prove a Debt should state the Grounds of its Rejection. 274

14. The Proof of a Creditor, who has Interests inimical to the general Creditors, ought not to be rejected on the Ground that he will be enabled, by his Proof, to elect himself Assignee. *Ex parte De Tasted.* 324

15. A Creditor who holds a Security, and is desirous of voting in the Choice of Assignees, is entitled to have the Security taken at its Value, and to prove for the Difference. *Ex parte Nunn,* 322. *Ex parte De Tasted.* 324

16. Upon Proof of an Annuity, the Value is to be ascertained by the Price paid, and the Time of Enjoyment, subject to the Circumstances of the Contract between the Parties. *Ex parte Thistlewood.* 290

17. Proviso in a Composition Deed, that in Case of Default of Payment, or if any Commission of Bankrupt should issue, before the Whole of the Composition should be paid, then the Covenants on the Part of the Creditors, whose Debts should be so unsatisfied, should be null and void: the second Instalment is not paid; a Commission issues; the Creditors are entitled to retain the first Payment, and to prove under the Commission, for the Residue of the original Debt. *Ex parte Vere.* 281

18. *A.* purchases an Annuity of £200, for £2000, to be paid after her Death. The Grantor becomes bankrupt, and is indebted to her in £2275: 5*s*: 9*d*. The Annuitant is not entitled to set off the £2000 against the £2275: 5*s*: 9*d*; for, as she could not be compelled to pay in Advance, the Bankrupt ought not to be compelled to receive in Advance. *Ex parte Whitaker.* 301

19. *A.* purchases an Annuity of *B.*, secured upon Lands in Fee Simple, falsely represented to be of equal Value

Value with the Annuity; and under that Representation not enrolled. Upon a Petition to prove, for the Value of the Annuity, the *Chancellor* gave Liberty to prove, without Prejudice to a Bill, reserving Dividends. *Quære*, How far, in a Case of Fraud, the Provisions of the Annuity Act might be dispensed with; not as against the Grantor, but against his Creditors? *Ex parte Wright.* *Page* 308

20. The Proof or Claim of a Debt operates as a Discontinuance in an Action, so as to preclude the Necessity of producing the Rule of Discontinuance, prior to the Proofs being admitted. *Ex parte Wooley.* 394

21. Composition between a Debtor and his Creditors, to pay them nine Shillings in the Pound, by four Instalments, with a Proviso, that in Case the Composition should not be duly paid, then that the Release should be null and void. The Debtor pays three Instalments, and becomes Bankrupt before the Time for the Payment of the fourth. The Creditors are not remitted to their original Debt, but entitled to a Proof only for the Amount of the remaining Instalment. *Ex parte Peele.* 435

22. Where *A.* a sole Trader, *B.* and *C.* Partners, and *D.*, also a sole Trader, engaged in a joint Adventure, and for a joint Purchase of Goods by them, the Vendor, with a Knowledge of their joint Interest, received in Payment a Bill drawn by *A.* on, and accepted by *B.* and *C.*: held, that on the Bankruptcy of *A.* and of *B.* and *C.*, the Vendor was entitled to prove the Bill against both their Estates. *Ex parte Walker.* *Page* 441

23. Commissioners cannot expunge a Proof: and as long as it remains upon the Proceedings, it must be considered as a Debt. *Ex parte Graham.* 456

24. *A.*, induced by the fraudulent Representations of *B.*, as to the Profits of his Business, gives him a certain Sum of Money for a Share of it. On the Discovery of the Fraud, *A.* files a Bill in Equity for an Account, to have the Partnership declared void, and for a Receiver.

The Receiver was ordered: *B.* becomes Bankrupt. Petition by *A*, to be admitted to prove under his Commission, refused, with Liberty to make a Claim. *Ex parte Broome.* 69

25. Although *A.*, as against *B.* might have an Equity to say he never was a Partner, it would be difficult to say so as against third Persons. *Ex parte Broome.* *ibid.*

26. *A.*, the Partner of *B.* carrying on Business at a different Place, draws Bills of Exchange, sometimes in the Name of the Firm, and sometimes in his own Name, on the Clerk of the Partnership managing the Business in *London*, and discounts them with Bankers in the Country.

Country. On an Application by them, that the Bills drawn in the separate Name of *A.* might be considered as a partnership Debt, as having been applied to partnership Purposes, the Lord *Chancellor*, expressing an Opinion against the Claim, directed Dividends to be reserved till after an Action at Law. *Ex parte Emly.* *Page* 16

27. If one Partner, meaning to cheat the other, purchases Goods used in the partnership Business, and instantly pawns them to raise Money for his own Use, the other Partner is liable, although there may have been no previous Dealings between the Parties; unless the Seller is guilty of Collusion. *ibid.* 62. N.

28. The Act of one Partner will bind another, as Partner of a distinct Firm. 3. N.

29. Partners constituting distinct Firms may prove against each other. But in a Partnership of two, one carrying on Business separately, as they are both liable for the same joint Debts, the solvent Partner is not entitled to prove under the Bankruptcy of his Co-partner a Debt for Goods sold by his distinct House to the Firm, until the joint Creditors have been satisfied. *Ex parte Adams.* 305

30. *A.* and *B.* trading under the Firm of *A.* and Co. agree with *C.* to purchase Coffee on a joint Account. *A.* and Co. to have the Management of it. *A.* and Co. purchase the Coffee, and *C.* pays them for his Share. *A.* and Co. without the Consent of *C.* deposit the Coffee with *D.* who advances Money on it, and, ignorant that *C.* is concerned in it, debits *A.* and Co. with the Advances. The Coffee is sold at a Loss: a Commission issues against *A.* and *B.* and another against *C.*; *D.* entitled to prove his Balance beyond the Proceeds, against the Estate of *C.* as well as against the Estate of *A.* and *B.* *Ex parte Gellar.* *Page* 297

31. A Partnership is not entitled to prove against the separate Estate of an individual Member of it, in Respect of Funds drawn by such Member out of the general Stock, unless the same have been drawn out fraudulently; that is, against the Articles of Partnership, without the Knowledge, Consent, Privity, or subsequent Approbation of his Copartners, or to increase his private Estate. *Ex parte Harris.* 437

32. The Conduct of the Parties in a Partnership may supersede the Stipulations of the Articles, and raise a Presumption of Assent to a different Agreement, and an Approbation of a Mode of Dealing with the partnership Funds, from their Knowledge of, and Acquiescence in it. *ibid.*

33. Joint Creditors under a Bankruptcy are bound by a *bonâ fide* Dissolution of the Partnership, and an Assignment of the partnership Estate and Effects to one of the Partners.

Partners. But where, after a Dissolution and such an Assignment, a Bill was filed by the retiring Partner against the other, alleging Fraud in the Non-performance of the Articles of Dissolution, and praying an Injunction and a Receiver, which were ordered: held, upon a subsequent Bankruptcy, that such Interference of the Court restored the Property to its original Character, as joint Property; unless the Plaintiff in Equity had, by his Conduct, between the Time of his obtaining the Injunction and the Bankruptcy, rendered nugatory the Effect of such Interference. And upon that an Inquiry directed. *Ex parte Rowlandson.* *Page* 416

34. Creditor *non compos mentis*; Proof, &c. admitted by a Person on his Behalf. *Ex parte Maltby.* 387

PROPERTY.

Property which does not pass by the Commission. *Vide* 197—199

The Assignees having sold the Goodwill and Interest of the Bankrupt's Trade, does not preclude him from setting it up again, provided he does not hold himself out as carrying on the same Trade, which has been the Subject of Purchase. *Crutwell* v. *Lye.* 123

PROTECTION.

See BILL OF EXCHANGE 9.

1. The Surrender of the Bankrupt at a private Meeting entitles him to his Protection from Arrest. *Ex parte Wood.* *Page* 46

2. But he must apply by Petition for his Discharge. 230

Cases in which the Bankrupt is protected. 264 N.

Where a Bankrupt may apply by Motion to be discharged; and when by Petition. 230 N.

3. A Bankrupt, whose last Examination had been adjourned *sine die*, at a Meeting under his Commission for a distinct Purpose, gives his voluntary Attendance before the Commissioners in order to be examined, and is there arrested: held, to be entitled to his Discharge on general Common Law Principles, and ordered so to be, with his reasonable and necessary Charges to be paid by the Solicitor and the Officer. *Ex parte Ross.* 260

4. Where the Arrest is illegal, all Detainers are inoperative. *ibid.*

5. The Commissioners can give no Directions which will protect an Officer from the legal Consequence of discharging his Prisoner. *ibid.*

6. Bankrupt attending Commissioners under a Summons from them, is protected from Arrest upon an Extent at the Suit of the Crown. *Ex parte Russell.* 278

7. Courts of Law will, upon Motion, discharge a Defendant from the Arrest of a Creditor who has gone in under the Commission. *Atherstone* v. *Huddlestone.* 112

8. A Witness attending before Commissioners, in order to tender his Testimony,

Testimony, upon a Subject of Inquiry then before them, without having been summoned for that Purpose, is privileged from Arrest during such Attendance, and returning.

Quære, If protected *eundo*? *Ex parte Byne.* *Page* 451

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See SHIP.

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SHIP.

1. Mortgagees of a Ship, having their Names inserted in the Registry, and without which their Security could not be effectual, are liable to Creditors in respect of Stores supplied for the Use of the Ship. The Possession of one Owner is the Possession of all. *Ex parte Machel.* 447

2. The Name of the Person appearing as the Owner, in the Registry of a Ship, is conclusive Evidence of his Title; more particularly against any Trust, arising, not by Operation of Law, but by the direct Act of the Parties: as it would defeat the Object and Policy of the Registry Acts, if equitable Interests were not excluded. *Ex parte Howton.* *Page* 177

SOLICITOR.

See PETITIONING CREDITOR. CERTIFICATE. PRACTICE.

1. The Attorney employed by the petitioning Creditor before the Choice of Assignees, and continued by the Assignees afterwards, having delivered his Bill to them, including all Charges incurred by Order of the petitioning Creditor, and having a certain Sum from the Assignees on Account of his Bill generally, is bound, as they themselves were, by the 25th Sect. of the Act, to appropriate the Sum so received, in Reduction of the Charges incurred by Order of the petitioning Creditor, and for which he was originally responsible: and the Amount of such Charges covered by the Sum so received cannot be set off by the Attorney, against a Debt due from him to the petitioning Creditor on his own Account. *Phillips* v. *Dicas.* 453

2. Joint Creditors under a separate Commission are not entitled to have the Expences of a Solicitor, employed by them to conduct Examinations, &c. before the Commissioners,

sioners, paid out of the joint Fund. *Ex parte Longman.* *Page* 303

SUPERSEDEAS.

See COMMISSION. ACT OF BANKRUPTCY. 2

1. Commission superseded, there not being an Act of Bankruptcy upon the Proceedings. *Ex parte Foster.* 40
2. A Bankrupt cannot supersede his Commission before Surrender. 211
   The Rule dispensed with under Circumstances. 228
3. The Lord *Chancellor* will supersede a Commission to which the Bankrupt has been prevented from surrendering by Ignorance or Mistake. *Ex parte Lavender.* 55
4. *A.* and *B.* Partners; separate Commissions issue against them; *A.* obtains his Certificate, but before it is confirmed by the Lord *Chancellor*, a joint Commission issues against him and *B.*; upon a Petition that *A.*'s separate Commission might be superseded, the Lord *Chancellor* directed the joint Commission to be superseded, on the Ground of Length of Time; and *A.*'s having obtained his Certificate, and a Doubt whether there were any joint Effects. *Ex parte Rowlandson.* 89
5. A Petition to supersede a Commission before the Adjudication of Bankruptcy is premature. *Ex parte Hague.* 150
6. Although an Order in Council, licensing a Party to export and import certain Goods to and from an Enemy's Country, does not authorize his Residence and Trading in the Enemy's Country; yet if he be there for the fair Purposes of his License, it is not a Ground for superseding a Commission founded on his Petition. *Ex parte Baglehole.* *Page* 271
   Where see the Cases of Disqualification, arising from Residence in an Enemy's Country. N.
7. *A.*, as the petitioning Creditor for a Commission against *B.*, makes Affidavit of his Debt as for Goods sold and delivered, although at the Time he had entered up Judgment in an Action for the Goods; upon an Application for a Superseadeas, it was contended, that *A.* had not made Affidavit of the "*Truth and Reality of his Debt:*" the Objection was over-ruled. In the Matter of *Bryant.* 288
8. It is discretionary in the Lord *Chancellor* to supersede a Commission; although it may be unimpeachable on strictly legal Grounds. *Ex parte Du Frene.* 333
9. Supersedeas on Account of Delay, 333, N. *Ex parte Fletcher.* 454
10. The Great Seal is in no Instance compelled to supersede a Commission, except by the imperative Language of the Statute 5 *Geo.* 2. c. 30. s. 24, where a petitioning Creditor receives from the Bankrupt greater Security or Satisfaction for his Debt than the Rest of the Creditors; but it is in the Habit of exercising

ercising a discretionary Power of Supersedeas, to prevent an Abuse of a Commission, as a Process in the Nature of an Execution, and from Analogy to the Practice of the other Courts in this Respect. *Ex parte Freeman.* *Page* 380

11. A separate Commission is superseded, to give Effect to a subsequent joint one, upon the Principle of Convenience and general Advantage to the Creditors. And the prior petitioning Creditor, unless he has been acting *malâ fide*, receives all the Costs of the superseding. *Ex parte Brown.* 432

12. When a Commission is superseded, every Thing done under it falls with it. A joint and separate Creditor, who sued out the separate Commission and proved under it, is, upon the Supersedeas, restored to his Right of Election, to prove against the joint Estate. Such a Creditor has a Right to elect out of which Estate he will be paid the Costs of the Supersedeas. *ibid.*

13. A Debtor compounded with his Creditors, then became bankrupt, and obtained his Certificate, but without paying fifteen Shillings in the Pound; afterwards, another Commission issued against him. Petition to supersede the last Commission, upon the Ground, that under the Circumstance all his Property belonged to the Assignees under the first Commission, dismissed. The Lord *Chancellor* being of Opinion, that, by the Statute 5 *Geo.* II. c. 30. s. 9, the future Property could not be taken Possession of by the Assignees, on Behalf of the Creditors under the Bankruptcy, but by the Creditors, as such, either generally or individually, proceeding against their Debtor in a Court of Law or Equity. *Ex parte Baker.* *Page* 452

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15. Cases of Supersedeas within the General Order of 26th *June*, 1793. 386

TRADING.

1. A Trading to support a Commission depends not upon the Quantity, but the Intention; and it is a Question for a Jury, whether there is enough to evidence that Intention. *Ex parte Magennis.* 84

2. Trading as a Lime-burner. *Ex parte Ridge.* 316

3. As a Delver of Stone. *Ex parte Gardner.* 377

4. A Fisherman buying Fish of other Boats at Sea, and selling it ashore, is a Trader within the Bankrupt Laws; and if such be the usual Practice of a particular Class of Fishermen, one of them, who is proved to have done so once, will be presumed to have continued to carry on his Business in the same Manner. *Heanny* v. *Birch.* 356

5. *Semble*, that a Scavenger is not a Trader within the Bankrupt Laws. *Ex parte Collins.* 373

6. Whether or not a Trader has ceased his Trading does not depend upon the mere Discontinuance of it, or the Absence of any specific Acts of Trading, but whether there then be an Intention to exercise or resume it; and that is a Question for a Jury. Whether or not a Person is a Trader, as a Scrivener, does not depend upon his occasionally doing such Acts of Trading as Scriveners were accustomed to do, but upon an Intention generally so to get his Living. *Ex parte Paterson.* *Page* 402

7. Trading as a Scrivener. *Page* 406, N.

TROVER.

The Assignees of a Bankrupt cannot recover the Amount of a Check paid by the Bankrupt's Bankers, after the Bankruptcy, in Trover for the Check against the Creditor, to whom the Check was delivered, and the Money paid. *Mathew* v. *Cousins* 118

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END OF THE FIRST VOLUME.

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